LIBRARY
SUPREME COURT, U. S.

FILED
MAY 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1374

CHARLES PILUSO, *Petitioner,*

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CHARLES A. HOBBS
1735 New York Ave., N.W.
Washington, D.C. 20006

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Baileys Cross Roads, Va.

Of Counsel:

WILKINSON, CRAGUN & BARKER
1735 New York Ave., N.W.
Washington. D.C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Citation to Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	3
Statutes and Rules Involved	6
Title 18, United States Code	6
New York Penal Law	8
Reasons Why the Writ Should Be Granted	9
I. The Opinion of the United States Court of Appeals for the Fourth Circuit Which Reversed the Ruling of Judge Bryan Who Held That the Instant Indictment Failed To Charge An Offense Under the Travel Act, and Which Affirmed the Contrary Ruling of Judge Lewis from the Same Court Who Held That the Federal Misdemeanor Title 18, U.S.C., Sec. 215, Constituted Bribery or Unlawful Activity under the Travel Act Is Contrary to This Court's Ruling in U.S. v. Nardello, 393 U.S. 286, Rewis v. The United States, 401 U.S. 808, and the Legislative History of Both Title 18, U.S.C., Sec. 1952 and Sec. 265	9
II. The Existing Conflict Among District Judges in the Southern District of New York, see U.S. v. Niedelman, 356 F. Supp. 979 contra; U.S. v. Maiolo, 72 Cr. 1123; U.S. v. Endresen, 73 Cr. 85; U.S. v. Hohn, 72 Cr. 1124; and U.S. v. Callahan, 72 Cr. 1126 (All Unreported), the Conflict in the Instant Case Between the Judges in the Eastern District of Virginia as to Whether the Commercial Bribery Statute of New York, Article 180, Bribery Within the Meaning of Title 18, U.S.C.	

Page

1952(b)(2) and This Court's Decision in Nardello v. The United States, 393 U.S. 286, 89 Sup.Ct. Rep. 534, Should Be Resolved by This Court 16

III. Under This Court's Decision in Leary v. The United States, 393 U.S. 631, 89 Sup.Ct. 532, Unless This Court Finds as the Court of Appeals Did, That Both Sec. 215 of Title 18, U.S.C. and Article 180 of the New York Penal Code Both Constitute Unlawful Activity Under Title 18, U.S.C. Sec. 1952(b)(2), the Petitioner Would Be Entitled To a New Trial 23

IV. The Conflicting Instructions of the Trial Judge in Particular, the Cocededly Erroneous Instruction to the Jury That the Petitioner Was Charged with Conspiracy to Violate § 215 of Title 18, U.S.C., Was Reversible Error Depriving the Petitioner of a Fair and Impartial Trial Under This Court's Ruling in Bolenbach v. The United States, 324 U.S. 837, 66 S.Ct. 402, and Chapman v. The State of California, 386 U.S. 23, 87 S.Ct. 824 (1967) 25

Conclusion 28

INDEX OF CITATIONS

CASES:

Agnew v. U.S., 165 U.S. 36, 17 S.Ct. 235 26
Bell v. The United States, 349 U.S. 1, 75 S.Ct. 620..14, 21-22
Bolenbach v. The United States, 324 U.S. 837, 66 Sup. Ct. 402 .....3, 25, 26
Chapman v. The State of California, 386 U.S. 23, 87 S.Ct. 824 (1967) 25, 27
Craig v. Warren, 99 Minn. 246, 109 N.W. 231 12
Erlenbaugh v. U.S. 409 U.S. 239 (1972) 16

Page

Fahy v. The State of Connecticut, 375 U.S. 85, 84 S.Ct. 229 27
Leary v. The U.S., 393 U.S. 631, 89 Sup.Ct. 532....2, 23, 24
Marshall v. U.S., 355 F.2d 999 (9th Cir.), cert denied 385, U.S. 815 18
McFarland v. U.S., 175 F.2d 538 (1949, D.C. Cir.) 26
Mills v. U.S., 164 U.S. 644, 17 S.Ct. 210 24
Nicola v. U.S., 72 F.2d 787 (3rd Cir. 1934) 24
Razette v. The United States, 199 F.2d 44 (6th Cir.), cert. denied 344 U.S. 904 (1952) 12
Rewis v. The United States, 401 U.S. 808, 91 S.Ct. 1056 (1971) 9, 13, 14, 16, 17, 21, 22
Stromberg v. California, 283 U.S. 359, 51 S.Ct 532.... 24
U.S. v. Bass (1972), 404 U.S. 336, 92 S.Ct. 515 ..... 15, 21
U.S. v. Brennan, 394 F.2d 151 (2nd Cir. 1968).....15, 18
U.S. v. Cozzette, 441 Fed.2d 344 (9th Cir. 1971) 18
U.S. v. Emmons, 410 U.S. 396 (1973), 93 S.Ct. 1007 ..15, 21
U.S. v. Johns, 444 F.2d 58. 24
U.S. v. Karigiannis, 430 F.2d 138 (7th Cir. 1970)....15, 18
U.S. v. Lane, 464 F.2d 953 .....11, 12
U.S. v. Nardello, 393 U.S. 286 (1969), 89 Sup.Ct. Rep. 534 .....9, 16, 17, 19, 20, 22
U.S. v. Niedelman, 356 Fed. Supp. 979 (1973) 16, 17, 20
U.S. v. Silver, 457 F.2d 1223 (10th Cir. 1972) 26
U.S. v. Teemer, 214 F.Supp. 952 (d.w.Va. 1967)..... 18
U.S. v. Wechsler, 392 F.2d 344 (4th Cir. 1968) 11
Yates v. U.S., 354 U.S. 298, 312 (1957) 24

STATUTES AND RULE:

Federal Reserve Act of 1913 (63rd Cong., December 23, 1913, 38 Stat. 272) 10

New York Penal Code:
Section 180 .....2, 3, 4, 6, 8, 13, 14, 16, 17, 22, 23, 24, 25
Section 200.0 .....8, 19
Section 70.15 9
Section 70.00 9

Page

18 U.S.C. 215 ..... *passim*
18 U.S.C. 371 ..... 7, 14, 15
18 U.S.C. 381 14
18 U.S.C. 1952 ..... 3, 4, 7, 9, 11, 15, 16, 22, 25
18 U.S.C. 1952(b)(2) 2, 15, 16, 17, 18, 19, 20, 22
28 U.S.C. 1254(1) 2
Federal Rules of Civil Procedure, Rule 34 4

MISCELLANEOUS:

Hearing on S. 1653-1658, S. 1665 14
House Report 69, 63rd Cong., First Session 1913 10
Senate Committee on the Judiciary, 87th Cong., 1st Session 14
108 University of Pennsylvania Law Review, p. 848 ... 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

CHARLES PILUSO, *Petitioner,*

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered on February 7, 1975, petition for rehearing was denied on March 4, 1975.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is attached to this Petition (Pet. App. 1a-7a). The Order denying the Petition for Rehearing and Rehearing En Banc is attached (Pet. App. 8a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 7, 1975, and Petition for Rehearing and Rehearing En Banc was denied on March 4, 1975. On March 20, 1975, Chief Justice Burger extended until May 3, 1975, the time within which to file certiorari (Pet. App. 29a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

I. Does an indictment charge an offense under the Travel Act and may a conviction be sustained when the indictment is premised on a violation of Title 18, U.S.C. § 215, as the " 'background' " identification of the alleged unlawful activities required by Title 18, U.S.C. § 1952 (b)(2)?

II. Does an indictment charge an offense under the Travel Act and may a conviction be sustained when the indictment is premised on a violation of Article 180 of the New York Penal Code as the "unlawful activity" as that term is used in Title 18, U.S.C. § 1952 (b)(2)?

III. Unless this Court agrees with the Court of Appeals that *both* Sec. 215 of Title 18 U.S.C. and Sec. 180 of the New York Penal Code constitute bribery and/or "unlawful activity" under Title 18, U.S.C. Sec. 1952 (b)(2) must not this Court under *Leary* v. *The United States*, 393 U.S. 631, 89 Sup.Ct. 532, award Petitioner a new trial?

IV. Is not a concededly erroneous instruction by the trial Judge to the jury, duly objected to, in which the

jury was advised that Petitioner was charged with a conspiracy to violate Sec. 215 of Title 18 U.S.C. prejudicial error which would require a new trial under this Court's ruling in *Bolenbach* v. *The United States,* 324 U.S. 837, 66 Sup.Ct. 402?[1]

STATEMENT OF THE CASE

The Petitioner, an attorney at law, was tried on three counts, the first count of which alleged a conspiracy to violate the Travel Act Title 18 Sec. 1952, the other two which charged substantive violations of the Travel Act, Title 18 U.S.C. Sec. 1952. The conspiracy count alleged that from July 1, 1967 to the filing of the indictment, the Petitioner conspired with others to violate Title 18, U.S.C. Sec. 1952 by using interstate travel themselves and causing others to use interstate travel with intent to carry on "unlawful activity, said unlawful activity being the crimes of commercial bribery, in violation of the laws of the State of New York and the paying of commissions to an officer of a bank the deposits of which were insured by the Federal Deposit Insurance Corporation for procuring loans from said bank in violation of Title 18, U.S.C. Sec. 215." (Pet. App. 10a-14a). The Petitioner filed a motion to dismiss the indictment asserting that the background

[1] The first two questions presented in this Petition are common and identical to the questions presented by the co-defendant in his Petition pending in this Court, *Louis Pomponio* vs. *The United States,* cert. pending No. 74-1260. That Petition for Certiorari challenges the correctness of the Court of Appeals opinion reversing the ruling of Judge Bryan which held the indictment in this case did not charge an offense under the Travel Act since neither Title 18, U.S.C. § 215 or Article 180 of the New York Penal Code constituted unlawful activity under the Travel Act. Petitioner herein adopts all of the arguments of the co-defendant in his Petition for Certiorari pending in this Court.

identification offenses namely Sec. 180 of the New York Penal Code and Sec. 215 of Title 18, U.S.C. failed to charge offenses which would constitute unlawful activities within the meaning of the Travel Act (Pet. App. 15a-26a). The Co-defendant, Louis Pomponio's trial was severed from that of Petitioner. Petitioner went to trial before Judge Oren R. Lewis of the United States District Court of the Eastern District of Virginia, who overruled the Petitioner's motion to dismiss the indictment for failure to charge an offense under the Travel Act. The case was submitted to the jury over Petitioner's objection and the jury was instructed by this Court that both Sec. 180 of the New York Penal Code and Sec. 215 of Title 18, U.S.C. were unlawful activities within the purview of Title 18, U.S.C. Sec. 1952.

The Petitioner's Co-defendant, whose case was severed was tried before Judge Bryan who expressed disagreement with Judge Lewis' ruling on the validity of the indictment under the Travel Act but stated he felt bound by his ruling. The Co-defendant Louis Pompanio was convicted and Judge Albert Bryan on May 17, 1974 pursuant to Rule 34 of the Federal Rules of Criminal Procedure granted an arrest of judgment in which he stated: "Sec. 215 of Title 18, U.S.C. and the New York Penal Code, in my view, do not come within the unlawful activity definition of Sec. 1952 of Title 18." (Pet. App. 8a-9a) See Slip Op. of the United States Court of Appeals Fourth Circuit (Pet. App. 4a).

The trial Judge instructed the jury on the Travel Act and its relationship to the unlawful activities which under this indictment stated, "that the defendant's would travel and wilfully cause others to

travel * * * with intent to promote, manage, establish and carry on * * * said unlawful activity being the crimes of commercial bribery, in violation of the laws in the State of New York and the paying of commissions to an officer of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, for procuring loans from said bank in violation of Title 18, U.S. Code, Sec. 215. * * * (i.e., The paying of commission is not made criminal by § 215 of Title 18. The criminal sanctions apply only to the receiver of the commission, etc.) The Trial Judge also erroneously told the jury that the Petitioner was being charged with conspiracy to violate Sec. 215 of Title 18, U.S.C. (Pet. App. 27a). Petitioner objected to this erroneous statement to the jury on the role of Sec. 215 of Title 18, U.S.C. in the indictment. The trial Judge refused to correct same (Pet. App. 27a). The Government in its brief in the Court of Appeals for the Fourth Circuit conceded that the instruction was erroneous but contended that it was harmless error. The Petitioner was convicted on all three counts and sentenced to two years in the penitentiary. Petitioner noted his appeal to the United States Court of Appeals for the Fourth Circuit and the Government noted their appeal in the companion case of *The United States* v. *Louis Pomponio* from the decision of Judge Bryan granting the arrest of judgment.

The United States Court of Appeals for the Fourth Circuit on February 7, 1975, rendered an opinion after consolidating Petitioner's case with that of the Co-defendant, Louis Pomponio, in which it affirmed the judgment of conviction as to the Petitioner and reversed the judgment of Judge Bryan which had

granted an arrest of judgment, as to the co-defendant Louis Pomponio. Judge Bryan held that Sec. 215, Title 18, U.S.C. and Sec. 180 of the New York Penal Code could not be made the basis for the invocation of the Travel Act. The Petition for Certiorari of the Co-defendant, Louis Pomponio, is pending in this Court No. 74-1260. The Chief Justice granted this Petitioner an extension of time until May 3, 1975, within which to file a Petition for Certiorari. (Pet. App. 29a)

STATUTES AND RULES INVOLVED

Title 18, United States Code

§ 215. Receipt of commissions or gifts for procuring loans.

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, § 1952, U.S.C. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promote, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

New York Penal Law

§ 180 Commercial bribing.

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employee or principal with intent to influence his conduct in relation to his employee's or principal's affairs.

Commercial Bribing is Class B misdemeanor.

§ 200.0 Bribery

A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Bribery is a class D felony.

* * *

§ 70.15 Sentences of imprisonment for misdemeanors and violation

* * *

2. Class B misdemeanor. A sentence of imprisonment for a class B misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed three months.

§ 70.00 Indeterminate sentence of imprisonment for felony

* * *

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

* * *

(d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years. . . .

* * * * *

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

The Opinion of the United States Court of Appeals for the Fourth Circuit Which Reversed the Ruling of Judge Bryan Who Held That the Instant Indictment Failed To Charge An Offense Under the Travel Act, and Which Affirmed the Contrary Ruling of Judge Lewis from the Same Court Who Held That the Federal Misdemeanor Title 18, U.S.C., Sec. 215, Constituted Bribery or Unlawful Activity Under the Travel Act Is Contrary to This Court's Ruling in U. S. v. Nardello, 393 U.S. 286, Rewis v. The United States, 401 U.S. 808, and the Legislative History of Both Title 18, U.S.C., Sec. 1952 and Sec. 215.

This issue presents a substantial question over the proper construction of the Travel Act where the jurisdiction is predicated on a federal conflict of interest

statute which proscribed a punishment for the receiver of a gratuity when he is an officer of a Federally Insured Bank. Two District Judges in the same court reached opposite conclusions on whether Sec. 215 of Title 18, U.S.C., could be made the basis of unlawful activity under the Travel Act, see *Louis Pomponio* v. *The United States,* U. S. No. 74-1260, cert pending.

The legislative history of Sec. 215 of Title 18, U.S.C. clearly establishes that this federal misdemeanor was a conflict of interest statute and not a bribery statute. The gravamen of Sec. 215 of Title 18, U.S.C. is not bribery or bribery in the "generic" sense. There is no penalty proscribed for the payor as there is in all bribery statutes. It has its origin in the Federal Reserve Act of 1913 (63rd Congress, December 23, 1913, 38 Stat. 272). Title 18, U.S.C. Sec. 215 makes it a misdemeanor and relates to advantage which a bank officer "by reason of his position of * * * influence or trust exacts from another. Violation of such statutes are generically classified "graft" rather than bribery. In House Report 69, 63rd Congress, First Session 1913, the following is stated:

> "In this section it is sought to correct a bad practice, all to prevalent, of paying fees to bank examiners in order that they may make a favorable report upon the condition of the bank; and further to end the illegitimate practice whereby officers of national banks have heretofore profited at the expense of borrowers by charging a commission or brokerage for the obtaining of loans. The extent of these practices cannot be stated, but that they prevail is certain; and it is equally clear that they are opposed to public welfare and

to sound banking, beside being wholly at variance with fundamental conduct. See *U. S.* v. *Lane,* 456 F.2d 593."

Judge Bryan who granted the arrest of judgment of the co-defendant's case was precisely correct when he stated:

> "I will therefore in accordance with Rule 34 arrest the judgment on the specific ground * * * the specific ground of the arrest of judgment is that the indictment, *counts 1, 5, and 9 do not charge an offense and the reason I am of the view that they do not charge an offense is because the unlawful activity referred to in the indictment as being promoted or furthered by the Defendant, Louis J. Pomponio, Jr.,* namely, § 215 of Title 18, U.S.C. and the New York Penal Code, *in my view, do not come within the unlawful activity definition of § 1952 of Title 18, U.S.C.*"

The Court of Appeals in holding that § 215 of Title 18, U.S.C. was unlawful activity within the meaning of the of the Travel Act stated:

> "The defendants further contend that since 18 U.S.C. § 215 criminalizes only the act of the bank officer who receives the proscribed thing of value, they as payors could not be convicted of an offense under that statute and, accordingly, it was improperly designated as an "unlawful activity" in the indictment. As pointed out in *United States* v. *Wechsler,* 392 F.2d 344 (Fourth Cir. 1968), the fallacy in such an argument lies in a too heavy reliance on the role played by § 215 in the indictment, and elides the fact that it serves "only as a background identification of the unlawful activities."

The judicial construction of this section as a conflict of interest statute is reflected in the decision of

the United States Court of Appeals for the Eighth Circuit in *United States* v. *Lane*, 464 F.2d 953, wherein the Court of Appeals stated:

> "It seems clear to us that the purpose of the Act was to protect the deposits of banks having federal insurance by preventing unsound and the improvident loans to be made from such deposits by officers and directors of the bank. * * * *In such a case, the banker is violating a position of trust that he owes to the bank.*"

There has always been a distinction between graft and bribery. Graft means an advantage which one person by reason of his peculiar position of superiority, influences, or trust exacts from another. See *Razette* v. *The United States*, 199 F.2d 44 (6th Cir.), cert. denied 344 U.S. 904 (1952). See *Craig* v. *Warren*, 99 Minn. 246, 109 N.W. 231.

While Sec. 215 of Title 18, U.S.C. only makes criminal the recipient of the gratuity and not the payor of the gratuity the indictment in this case affirmed by the Court of Appeals purported to charge a federal offense under the Travel Act by invoking § 215 of Title 18, U.S.C. as the bribery or unlawful activity. The conspiracy count alleged a conspiracy to violate the Travel Act, and charged that the unlawful activity was "the paying of commissions to an officer of the bank, deposits of which were insured * * * in violation of Title 18, U.S.C. § 215." While this does not even charge a violation of Title 18, U.S.C. § 215, *it was not even described as bribery in the conspiracy count.* The Government, however, did charge that it constituted bribery in the two substantive counts 5 and 9. In the two substantive counts, the language used, was "did unlawfully * * * travel * * * with

intent to * * * said unlawful activity being the crime of bribery in violation of the laws of the State of New York (New York Penal Law, Article 180) and of the United States Title 18, U.S.C. § 215.

The Court of Appeals is reversing the dismissal of the indictment by Judge Bryan and affirming the contrary decision of Judge Lewis in the same court, held that although as payors the Defendants could not be convicted under § 215 of Title 18, U.S.C., it nevertheless qualified as a "background identification offense" to support the jurisdiction of the Travel Act by stating (Pet. App. 6a-7a):

> "The defendants further contend that since Title 18, U.S.C. § 215 criminalizes only the act of the bank officer who receives the proscribed thing of value they, as payors, could not be convicted of an offense under that statute, and, accordingly it was improperly designated as an unlawful activity in the indictment * * *. The 'unlawful activity' specified within the Act may be bribery under either State or Federal law and reference to such law is necessary only to identify the type of 'unlawful activity' in which the defendants intended to engage. Proof that the unlawful objective was accomplished or that the referenced law has been violated is not a necessary element of the offense defined in § 1952. * * * Accordingly, we find it sufficient that the indictment charged the defendant with inter state travel with the intent inter alia to facilitate the violation of the federal statute."

The ruling below constitutes a departure from the warnings of this Court in *Rewis* v. *The United States*, 401 U.S. 808, 91 S.Ct. 1056 (1971), and constitutes an enlargement of Travel Act jurisdiction beyond what

the legislative history plainly indicates that the Travel Act was concerned with but such a construction also serves to obstruct and bring into conflict sentencing potentials proscribed by Congress when it enacted Title 18, U.S.C. § 215, and Title 18, U.S.C. § 371. See Hearing on S. 1653-1658, S. 1665. Before the Senate Committee on the Judiciary, 87 Cong. 1st Sess.

This Court concluded its warning in the *Rewis* case *supra,* when it stated:

> "In short, neither statutory language nor legislative history supports such a broad ranging interpretation of § 1952. And, even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, citing *Bell* v. *The United States,* 349 U.S. 1, 75 S.Ct. 620."

The present opinion not only obstructs sensitive federal-state relations in dealing with the New York misdemeanor statute of commercial bribery Article 180, which is escalates from a misdemeanor punishable by three (3) months in jail into federal felony, it also seriously conflicts with the prior expressed will of Congress in proscribing criminal penalties with respect to Title 18, U.S.C. § 215 and Title 18, U.S.C. § 381. Congress made Title 18, U.S.C. § 215, a federal misdemeanor punishable by a fine of not more than 5,000 or imprisonment for not more than one (1) year or both. The Court of Appeals by allowing § 215 of Title 18, U.S.C. to be used as a " 'background identification offense' " for the invocation of The Travel Act has escalated the misdemeanor into a felony with a potential sentence of a fine of not more than $10,000

and imprisonment for not more than five (5) years *or both.*

Congress, in passing Title 18, U.S.C. § 371, the general conspiracy count expressly provided in that statute that the penalty for the substantive statute for which the conspiracy is directed. In this case, if the petitioner had been charged with a conspiracy to violate § 215, the maximum penalty for such a conspiracy would be one (1) year—which is the maximum provided by § 215.

However, by charging conspiracy to violate § 1952, which in turn, is based on § 215, as the unlawful activity, the petitioner has become exposed to the five (5) year penalty provided in § 1952. Certainly Congress did not intend by passing the Travel Act to escalate the penalties provided for by Congress in prior enactments.

The Court of Appeals disposed of this argument by citation to decisions of the Second and Seventh Circuits in *U. S.* v. *Karigiannis,* 430 F.2d 138 (7th Cir. 1970), *U.S.* v. *Brennan,* 394 F.2d 151 (2nd Cir. 1968).

We suggest that the decisions cited by the Court of Appeals refer to the misdemeanors outlined in § 1952 (b)(1) which only invoke the Travel Act if part of a continuous enterprise (see Argument, *infra* p. 18). They have no bearing on the three felonies outlined in § 1952(b)(2), extortion, bribery, and arson which are invariably felonies under state and federal law.

Bearing in mind that all criminal statutes, *U.S.* v. *Bass,* 404 U.S. 336, *U.S.* v. *Emmons,* 410 U.S. 396, should be narrowly construed, this case presents an

issue of great importance involving the proper and consistent interpretation of the Travel Act and this Court's past constructions of it. We ask this Court to grant the writ of certiorari in light of the substantial question presented on the proper construction of the Travel Act, Title 18, U.S.C. § 1952; because of the conflicts existent in the lower federal Courts and because the ruling is contrary to this Court's past pronouncements on the proper scope and interpretation of the Act. *U.S.* v. *Nardello,* 393 U.S. 286 (1969); *Erlenbaugh* v. *U.S.;* 409 U.S. 239 (1972); *Rewis* v. *U.S.,* 401 U.S. 808 (1971).

II.

The Existing Conflict Among District Judges in the Southern District of New York, see U.S. v. Niedelman, 356 F.Supp. 979 contra: U.S. v. Maiolo, 72 Cr. 1123; U.S. v. Endresen, 73 Cr. 85; U.S. v. Hohn, 72 Cr. 1124; and U.S. v. Callahan, 72 Cr. 1126 (All Unreported), the Conflict in the Instant Case Between the Judges in the Eastern District of Virginia as to Whether the Commercial Bribery Statute of New York, Article 180, Bribery Within the Meaning of Title 18, U.S.C. Sec. 1952(b)(2) and This Court's Decision in Nardello v. The United States, 393 U.S. 286, 89 Sup.Ct. Rep. 534, Should Be Resolved by This Court.

The Court of Appeals opinion is the first appellate ruling that Sec. 180 of the New York Penal Code defining the misdemeanor commercial briberty is substantively equal to bribery under Title 18, USC Sec. 1952 (b)(2) of The Travel Act. It is the first appellate holding that as distinguished from the misdemeanors and felonies outlined as unlawful activity in 1952 (b)(1) that a misdemeanor such as commercial bribery could qualify as an unlawful activity under

Title 18, U.S.C. 1952 (b)(2), which specifies three felonies, namely, bribery, extortion and arson.

The opinion of the United States Court of Appeals reversed the arrest of judgment entered by Judge Bryan for the Co-defendant, Louis Pomponio (cert. pending in this Court No. 74-1260), and rejected a similar ruling by Judge Knapp in the Southern District of New York, *United States* v. *Niedelman*, 356 Fed. Supp. 979 (1973). The Court of Appeals opinion we submit is predicated upon a misreading of this Court's decision in *United States* v. *Nardello, supra,* and is contrary to this Court's ruling in *Rewis* v. *The United States, supra.*

In light of the expansive treatment of The Travel Act by the Court of Appeals with respect to its equation of the misdemeanor of commercial bribery, Article 180 of the New York Code with the crime of bribery as outlined in Title 18, U.S.C. § 1952 (b)(2), the existing conflict among the District Judges in New York as to whether commercial bribery is bribery under § 1952 (b)(2) of the Travel Act, and the conflict between the District Judges in the instant case should prompt this Court to resolve an issue, important as it is to the proper construction of an important criminal statute such as the Travel Act.

The indictment in this case sought to invoke the provisions of Title 18, U.S.C. Sec. 1952 (b)(2), which prohibits travel to engage in the unlawful activity of *"extortion, bribery, or arson in violation of the laws of the state in which committed or of the United States."* It is to be noted that the offenses outlined in Sec. 1952 (b)(2) are invariably felonies

under state and federal law while the offenses in Sec. 1952 (b)(1) are a mixture of felonies and misdemeanors. In order for the offense in 1952 (b)(1) to invoke the Travel Act, they must be part of a continuous enterprise, see *United States* v. *Cozzette,* 441 Fed.2d 344 (9th Cir. 1971); *United States* v. *Teemer,* 214 F. Supp. 952 (d.w.Va. 1967). It is this section, not Sec. 1952 (b)(2) that the cases cited by the Court of Appeals were relevant when the Court of Appeals stated:

> "Finally, the defendants argue that our construction of the Act improperly escalates these underlying misdemeanors to federal felonies, but such a contention has been summarily rejected by the courts. *U.S.* v. *Karigiannis* 430 F.2d 148 (7th Cir. 1970), *U.S.* v. *Brennan* 394 F.2d 151 (2nd Cir. 1968)." (Pet 7a)

These decisions cited by the Court have specific relationships to the amalgam of misdemeanors outlined in Sec. 1952 (b)(1) such as prostitution, gambling and liquor violations which are often connected with organized crime. They have no application to the three specific felonies outlined in Sec. 1952 (b)(2), and as the legislative history plainly shows when Congress enacted Sec. 1952 (b)(2), Congress was discussing bribery in terms of the corruption of public officials an offense which is invariably a felony under a federal and state law. One violation of the offense outlined in Title 18 § 1952 (b)(2) invokes the jurisdiction of the Travel Act. It does not have to be a part of continuous enterprise as do the misdemeanors and felonies set forth in Title 18 § 1952 (b)(1). See *Marshall* v. *U.S.,* 355 F.2d 999 (9th Cir.), cert. denied, 385 U.S. 815. New York does have a general bribery stat-

ute involving public officials which is Sec. 200. It is a class D felony with a sentence of up to seven (7) years. The commercial bribery statute of New York which is a Class B misdemeanor, which carries a maximum term of imprisonment for three months and plainly was never contemplated by Congress as the bribery specified in Sec. 1952 (b)(2).

The Court of Appeals reliance on this Court's decision in the *United States* v. *Nardello, supra,* to conclude that commercial bribery is substantively equal to common law bribery insofar as the invocation of the Travel Act is concerned is a misreading of the Court's opinion in Nardello. In the Nardello case, this Court in dealing with a state crime which was labeled blackmail held that it was substantively equivalent to extortion and thus, could properly invoke the jurisdiction of the Travel Act of Sec. 1952 (b)(2). The Court of Appeals seized on the language of this Court in Nardello when it stated:

> "Paraphrasing the language of the Court in *Nardello,* "(i)n light of the scope of the congressional purpose we decline to give the term (bribery) an unnaturally narrow reading * * * and thus conclude that the acts for which (defendants) have been indicted fall within the generic term (bribery) as used in the Travel Act." 393 U.S. at 296.

We submit the opinion of the Court of Appeals has misread the import of this Court's ruling by equating this Court's holding that blackmail and extortion are substantively equal regardless of label and *applying this reasoning to hold that bribery and commercial bribery are substantively equal.* These two offenses are basically synonomous only in that the word bribery is common to both of them. While there is a simi-

larity of labels, there is a total dissimilarity in the substance of the crimes involved. Commercial bribery is a crime of rather recent vintage on the statute books of approximately thirteen (13) states. See 108 University of Pennsylvania Law Review, p. 848. It is totally distinguishable from common law bribery which the legislative history of Sec. 1952 (b)(2) plainly shows was what Congress was concerned with when the term bribery was used in the statute. This is conceded by the opinion of the Court of Appeals in their opinion (Pet. App. 5a).

The Court of Appeals in holding that commercial bribery constituted unlawful activity within the meaning of the Travel Act stated (Pet. App. 5a):

> "however, while the states and federal government have enacted statutes dealing with the corruption of public officials, they have also extended the concept of bribery into areas of private conduct which we think appropriately fall within the ambit of the Travel Act."

The refutation of this argument is reflected in footnote 11 of this Court's opinion in *U.S.* v. *Nardello, supra,* where the Court quoting from the Government's brief stated:

> "Bribery has traditionally focused upon corrupt activities of public officials."

The Court also in footnote 9 of the Nardello opinion excerpted from a letter dated August 7, 1961, from then Deputy Attorney General Byron R. White setting out the position of the Justice Department during the period when the Travel Act was under consideration. 393 U. S. at 292 n.g. In *U. S.* v. *Niedel-*

man, N.Y., Judge Knapp stated in holding § 180 to be outside the scope of the Travel Act:

> "As I read the Nardello decision, the Court laid down some rather clear guidelines for resolving such a question. Interpretation of the Travel Act, Nardello declared should have the effect of carrying forward two basic Congressional objectives: (1) to assist the states in fighting the deprivations of the organized underworld (393 U. S. at 290-292, 89 S.Ct. 534 and, (2) insofar as possible as to achieve an interpretation having a uniform effect throughout the nation (at 293-294, 89 S.Ct. 534). The interpretation urged by the Government in the case at bar would further neither of these objectives and would utterly thwart the second."
>
> "As to the first objective, the extensive Congressional hearing cited by the Court in Nardello and by respective counsel in the case at bar contain not so much as a hint that so called 'commercial bribery' (as opposed to the conventional bribery arson and extortion) was ever considered to be a typical tool of the underworld. * * * In other words, the interpretation of the Travel Act which the Government here urges would in some states have the drastic effect of converting a minor state offense into a major federal felony, while in other states it would have no effect whatever. * * * I need not—and for present purposes do not—question the Congress' power to create such a situation. *However, I find absolutely no evidence that Congress harbored any such intent.* Cf. *U. S.* v. *Bass* (1972), 404 U.S. 336, 92 S.Ct. 515, and *U. S.* v. *Enmons* (1973), 410 U.S. 396, 93 S.Ct. 1007."

As this Court warned in *Rewis* v. *U. S.*, 401 U.S. 808, 91 S.Ct. 1056:

> "In short, neither statutory language nor legislative history supports such a broad ranging in-

terpretation of § 1952. And, even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, citing *Bell* v. *The United States,* 349 U.S. 1, 75 S.Ct. 620."

The divergence of opinion in the Southern District of New York among the District Judges as to whether Sec. 180 of the New York Penal Code constitutes bribery under Sec. 1952 (b)(2), the same conflict among the District Judges in the Eastern District of Virginia, see *Louis Pomponio* v. *United States of America* No. 74-1260, cert. pending, should prompt this Court to grant the writ of certiorari and resolve the issue. It is also important for this Court to grant review in order that there may be consistency and uniformity and fairness in the enforcement of the Travel Act. At the present time, in the Southern District of New York the upholding or the dismissal of a Travel Act indictment predicated on Sec. 180 of the New York Penal Code is dependent upon what Judge the case is referred to because of the existing conflict. While the conflict in the Eastern District of Virginia has been resolved by the decision in the instant case, we submit that it is predicated upon a misreading of this Court's decision in *Nardello* v. *The United States, supra,* and the teachings of this Court in *Rewis* v. *The United States, supra,* which should prompt this Court to grant the writ of certiorari.

III.

Under This Court's Decision in Leary v. The United States, 393 U.S. 631, 89 Sup.Ct. 532, Unless This Court Finds as the Court of Appeals Did, That Both Sec. 215 of Title 18, U.S.C. and Article 180 of the New York Penal Code Both Constitute Unlawful Activity Under Title 18, U.S.C. Sec. 1952(b)(2), the Petitioner Would Be Entitled To a New Trial.

The trial Court instructed the jury that both 180 and Sec. 215 of Title 18, U.S.C. could constitute unlawful activity when he instructed:

> "THE COURT: As I have told you because in these two counts you must find that the crime was committed, that is again the crime in the travel in interstate commerce in furtherance of the bribery, the prohibited unlawful activity, one or the other, either in violation of the state law that I have read you as defined there or in violation of the federal banking law." (Tr. 1220)

Thereafter the Court stated (Tr. 1229):

> "It is intent to promote or facilitate all the other words I used in connection therewith, the prohibited unlawful activity as set forth in that statute.
>
> Those two unlawful activities set forth are the bribery of Mr. Zneimer as that word used in the two statutes, the banking statute that I read you and that state statute."

Both Judge Bryan and the Court of Appeals recognized that unless both Sec. 215 of Title 18, U.S.C. and Article 180 of the New York Penal Code constituted unlawful activity within the meaning of the Travel Act a new trial would be required because

it would be impossible to determine on what basis or theory the jury returned its verdict in light of the instructions to the jury on both statutes could constitute unlawful activity under the Travel Act (see p. 17 of the Petition for Certiorari filed by the Co-defendant, Louis Pomponio pending in this Court No. 74-1260). The Court of Appeals recognized this issue but ruled that in light of their holding that both Sec. 215 of Title 18, U.S.C. and Article 180 of the New York Penal Code could each properly invoke the jurisdiction of the Travel Act, there was no requirement for them to pass on this issue. The Court of Appeals stated at footnote 12 (Pet. App. 6a-7a):

> "Defendants take the position that if either the New York commercial bribery law or the federal statute was improperly included in the indictment, the indictment must fall. In view of our disposition of the case, we find it unnecessary to reach this point."

In *Leary* v. *The United States, supra,* this Court stated:

> "It has long been settled that when a case is submitted to a jury on alternative theories the unconstitutionality of any of the theories requires the conviction be set aside. See *Stromberg* v. *California,* 283 U.S. 359, 51 S.Ct. 532. See also, *Mills* v. *United States,* 164 U.S. 644, 17 S.Ct. 210, *Nicola* v. *United States,* 72 F.2d 787 (3rd Cir. 1934), *Yates* v. *United States,* 354 U.S. 298, 312 (1957), and *United States* v. *Johns,* 444 F.2d 58."

Therefore, unless this Court agrees with the expansive construction of the Travel Act, as rendered by the Court of Appeals in this case and specifically,

unless this Court agrees that Sec. 180 of the New York Penal Code and Sec. 215 of Title 18, U.S.C. each constitute unlawful activity within the meaning of the Travel Act, the Petitioner would be entitled to a new trial premised upon the decisions of this Court set forth above.

IV.

The Conflicting Instructions of the Trial Judge in Particular, the Concededly Erroneous Instruction to the Jury That the Petitioner Was Charged with Conspiracy to Violate § 215 of Title 18, U.S.C., Was Reversible Error Depriving the Petitioner of a Fair and Impartial Trial Under This Court's Ruling in Bolenbach v. The United States, 324 U.S. 837, 66 S.Ct. 402, and Chapman v. The State of California, 386 U.S. 23, 87 S.Ct. 824 (1967).

While the only conspiracy the Petitioner was charged with was a conspiracy to violate the Travel Act, Title 18, U.S.C. § 1952, the trial Judge instructed the jury that Petitioner was charged with conspiracy to violate § 215 of Title 18, U.S.C. Objection was made at the conclusion of the charge (Pet. App. 27a), which was overruled by the trial Judge. The brief of the Government in the Court of Appeals admitted that the instruction was erroneous but contended it was not prejudicial error in light of the Court's entire charge.

The erroneous instruction of the trial Judge in this case went to an essential issue and misadvised the jury as to what the Petitioner was being tried for. The jury received two completely contradictory instructions on the role of § 215 of Title 18, U.S.C., and its relationship to the indictment and two contradictory instructions as to what conspiracy the Pe-

titioner was being tried for. This Court in *Bolenbach* v. *the United States, supra,* stated:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue * * *. A charge should not be misleading. See *Agnew* v. *U. S.,* 165 U.S. 36, 17 S.Ct. 235."

In *McFarland* v. *The United States,* 174 F.2d 538 (1949, D.C. Cir.), the Court of Appeals for the District of Columbia stated:

> "If a charge to a jury considered in its entirety, correctly states the law, the incorrectness of one paragraph or one phrase standing alone ordinarily does not constitute reversible error; *but it is otherwise if two instructions are in direct conflict and one is clearly prejudicial for the jury might have followed the erroneous instruction.*"

See *United States* v. *Silver,* 457 F.2d 1223 (10th Cir. 1972). To demonstrate the nature of the prejudice from this erroneous instruction, we call the Court's attention to the fact that the Court of Appeals in their opinion stated that the defendants placed a "too heavy reliance on the role played by § 215 in the indictment and eludes the fact that it served " 'only as a background identification of the unlawful activity' ".

This de-minimus role the Court of Appeals attached to the importance of § 215 of Title 18, U.S.C. to the indictment is at variance with the instruction of the trial Judge *which misadvised the jury and told them that the Petitioner was being charged substantively with a conspiracy to violate § 215 of Title 18, U.S.C. The jury was, therefore, improperly told that the Petitioner was being tried for an offense which, in*

fact, he was not being tried for. This Court in *Chapman* v. *the State of California, supra,* stated that in determining whether error is harmless or prejudicial quoted from its decision in *Fahy* v. *the State of Connecticut,* 375 U.S. 85, 84 S.Ct. 229:

> " 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " * * *

The Court then stated that the standard in determining whether the error was harmless stated:

> "We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we do now, that before a federal constitutional error can be held harmless the Court must be able to declare a belief that it was harmless without a reasonable doubt."

The Petitioner's substantial rights were effected by this improper and erroneaus instruction which misstated the conspiracy for which the Petitioner was on trial and consistent with the ruling above, this Court should grant the write of certiorari and award the Petitioner a new trial.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the Judgment and Opinion of the Fourth Circuit.

Respectfully submitted,

CHARLES A. HOBBS
1735 New York Ave., N.W.
Washington, D.C. 20006

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Baileys Cross Roads, Va.

Of Counsel:

WILKINSON, CRAGUN & BARKER
1735 New York Ave., N.W.
Washington, D.C. 20006

Opinion

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1667

UNITED STATES OF AMERICA, *Appellant,*

v.

LOUIS POMPONIO, *Appellee.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

No. 74-1668

UNITED STATES OF AMERICA, *Appellee,*

v.

CHARLES J. PILUSO, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued October 4, 1974 Decided February 7, 1975

Before BUTZNER, RUSSELL and FIELD, Circuit Judges.

Frank W. Dunham, Jr., Assistant United States Attorney, (David H. Hopkins, United States Attorney, on brief) for Appellant in No. 74-1667; Alan Y. Cole (Lee A. Schutzman & Cole and Groner on brief) for Appellee in No. 74-

1667; Albert J. Ahern, Jr. for Appellant in No. 74-1668; Thomas K. Moore, Assisant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee in No. 74-1668.

FIELD, Circuit Judge:

The principal question on these appeals is the sufficiency of an indictment returned by a grand jury in the Eastern District of Virginia aganist Louis J. Pomponio, Jr., along with his brothers, Peter and Paul Pomponio, and their attorney, Charles J. Piluso, charging them with violating and conspiring to violate the Travel Act, 18 U.S.C. § 1952.[1]

---

[1] 18 U.S.C.

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub. L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.

The charges in the indictment stemmed from payments totaling over $300,000 allegedly made by the defendants to Sidney M. Zneimer, a Vice President of the Royal National Bank in New York City, for the purpose of influencing his conduct relative to a number of loans made by the bank to corporations owned or controlled by the Pomponios.

The indictment tracks the language of the statute charging that the defendants "did willfully travel from the State of Virginia to the State of New York, with the intent to promote, manage, carry on, and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180) [2] and of the United States Title 18, United States Code, Section 215); [3] the said unlawful activity relating to the efforts of LOUIS J. POMPONIO, JR., CHARLES J. PILUSO and PAUL POMPONIO to influence Sidney M. Zneimer in the performance of his duties at the

---

[2] § 180.00. Commercial bribing

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

Commercial bribing is a class B misdemeanor.

[3] § 215. Receipt of commissions or gifts for procuring loans.

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

Royal National Bank by giving the said Sidney M. Zneimer checks, as detailed in the table below * * *."[4]

Prior to trial the defendants filed a motion to dismiss the indictment on the ground that neither commercial bribery under the New York statute nor the receipt of commissions or gifts by a bank official proscribed by section 215 of the federal code constitute "unlawful activity" within the purview of section 1952. Judge Oren R. Lewis declined to grant the motion and set the case for trial. However, Louis J. Pomponio, Jr., was hospitalized because of illness and the trial proceeded against the other three defendants. The court granted a motion for judgment of acquittal of Peter Pomponio and the jury returned a verdict of not guilty with respect to his brother Paul. Charles J. Piluso was found guilty on all three counts and has appealed his conviction in Case No. 74-1668. Thereafter, Louis J. Pomponio, Jr. was tried before Judge Albert V. Bryan, Jr., and was found guilty by the jury. During the course of this trial, Pomponio's counsel challenged the sufficiency of the indictment in a motion for judgment of acquittal. Judge Bryan, understandably, felt bound by the earlier ruling of Judge Lewis and denied the motion. However, Judge Bryan granted Pomponio's post-trial motion for arrest of judgment, holding that "Section 215 of Title 18 of the U. S. Code and the New York Penal Code, in my view do not come within the unlawful activity definition of Section 1952 of Title 18." The government has appealed this action in Case No. 74-1667.[5]

---

[4] Although the indictment contained one conspiracy count under 18 U.S.C. § 371 and eight substantive counts, the government proceeded to trial on the conspiracy count and only two of the substantive counts, Counts Nos. V and IX. The quoted language is from Count No. V of the indictment, but charging language to the same effect was employed in the conspiracy count as well as Count No. IX.

[5] The motion in arrest of judgment was granted pursuant to Rule 34, Fed. R. Cr. P., and is appealable under 18 U.S.C. § 3731. *See* Esposito v. United States, 492 .2d 6 (7 Cir. 1974).

Primarily, the defendants contend that the word "bribery" as used in the Travel Act is intended to mean bribery in the classic sense of the common law which was limited to the corruption of public officials in the administration of their public trust and does not extend to such conduct by private individuals. Concededly, the crime of bribery was originally limited to cases involving the corruption of those in the public service,[6] and some statements in the limited legislative history of the Act might appear to support the position of the defendants.[7] However, while the states and the federal government have enacted statutes dealing with the corruption of public officials, they have also extended the concept of bribery into areas of private conduct which we think appropriately fall within the ambit of the Travel Act.[8] "There can be no question but that any crime of bribery involves moral turpitude,"[9] and we discern no reason why the Congress, in using the term "bribery," intended that it be limited to the corruption of public officials.[10] We find the answer to this contention of the defendants in *United States* v. *Nardello*, 393 U.S. 286,

---

[6] *See* 3 Wharton's Criminal Law and Procedure, §§ 1380, et seq., (R. Anderson Ed. 1957).

[7] See Hearing on S. 1654-58, S. 1665 Before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961).

[8] *See, e.g.*, 18 U.S.C. §§ 201, 203, 210, 211 and 214; N.Y. Penal Law §§ 200.00 and 200.10 (McKinney 1973), bribery of a public servant and bribe receiving by a public servant; N.Y. Penal Law §§ 180.15 and 180.25 (McKinney 1967), bribery of a labor official and bribe receiving by a labor official; N.Y. Penal Law §§ 180.40 and 180.45 (McKinney 1967), sports bribing and sports bribe receiving.

[9] United States v. Esperdy, 285 F.2d 341, 342 (2 Cir. 1961).

[10] In the Southern District of New York one judge has reached the conclusion that commercial bribery under the New York statute does not fall within section 1952. United States v. Niedelman, 356 F.Supp. 979 (1973). However, he acknowledges that "[s]imilar contentions have heretofore been considered and rejected in this District [in four other decisions]." *Id.* at 981.

292-293 (1969), where a similar argument with respect to the meaning of the word "extortion" in the Act was urged upon the Court. In rejecting this argument the Court stated:

> "Appellees suggest, however, that Congress intended that the common-law meaning of extortion—corrupt acts by a public official—be retained. If Congress so intended, then § 1952 would cover extortionate acts only when the extortionist was also a public official. Not only would such a construction conflict with the congressional desire to curb the activities of organized crime rather than merely organized criminals who were also public officials, but also § 1952 imposes penalties upon any individual crossing state lines or using interstate facilities for any of the statutorily enumerated offenses. The language of the Travel Act, 'whoever, crosses state lines or uses interstate facilities, includes private persons as well as public officials."

Paraphrasing the language of the Court in *Nardello*, "[i]n light of the scope of the congressional purpose we decline to give the term [bribery] an unnaturally narrow reading • • • and thus conclude that the acts for which [defendants] have been indicted fall within the generic term [bribery] as used in the Travel Act." 393 U.S. at 296.

The defendants further contend that since 18 U.S.C. § 215 criminalizes only the act of the bank officer who receives the proscribed thing of value, they as payors could not be convicted of an offense under that statute [11] and, accordingly, it was improperly designated as an "unlawful activity" in the indictment.[12] As pointed out in *United States* v.

---

[11] Incident to this contention, counsel in their arguments and briefs discussed at some length the dichotomy with respect to the question of whether the payor can be convicted as an aider and abettor under a statute such as 18 U.S.C. § 215. *See* United States v. Kenner, 354 F2d 789 (2 Cir. 1965); United States v. Bowles, 183 F.Supp. 237 (D.C. Me. 1958); *cf.* May v. United States, 175 F.2d 994 (D.C. Cir. 1949); *see also* United States v. Johnson, 337 F.2d 180 (4 Cir. 1964).

[12] Defendants take the position that if either the New York commercial bribery law or the federal statute was improperly included

Wechsler, 392 F.2d 344 (4 Cir. 1968), the fallacy in such an argument lies in a too heavy reliance on the role played by section 215 in the indictment, and elides the fact that it serves "only as a background identification of the unlawful activities."[13] The "unlawful activity" specified in the Act may be bribery under either state or federal law and reference to such law is necessary only to identify the type of "unlawful activity" in which the defendants intended to engage. Proof that the unlawful objective was accomplished or that the referenced law has actually been violated is not a necessary element of the offense defined in section 1952. *See United States* v. *Rizzo,* 418 F.2d 71 (7 Cir. 1969); *McIntosh* v. *United States,* 385 F.2d 274 (8 Cir. 1967). Accordingly, we find it sufficient that the indictment charged the defendants with interstate travel with the intent, *inter alia,* to facilitate the violation of the federal statute by Zneimer. Finally, the defendants argue that our construction of the Act improperly escalates these underlying misdemeanors to federal felonies, but such a contention has been summarily rejected by the courts. *United States* v. *Karigiannis,* 430 F.2d 148 (7 Cir. 1970); *United States* v. *Brennan,* 394 F.2d 151 (2 Cir. 1968).

We have considered the other points raised on Piluso's appeal and find no reversible error. Accordingly, the conviction in No. 74-1668 is affirmed. The order of the district court granting Pomponio's motion in arrest of judgment in No. 74-1667 is reversed, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN CASE NO. 74-1668.

REVERSED AND REMANDED
IN CASE NO. 74-1667.

---

in the indictment, the indictment must fall. In view of our disposition of the case, we find it necessary to reach this point.

[13] 392 F.2d at 346.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1668

UNITED STATES OF AMERICA, *Appellee,*

v.

CHARLES J. PILUSO, *Appellant.*

Order

Upon consideration of appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is, therefore, ORDERED, That the petition for rehearing be and it is hereby denied.

For the Court—By Direction.

/s/ WILLIAM K. SLATE, II

Clerk

Opinion of Judge Bryan Granting Arrest of Judgment

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 269-73-A

THE UNITED STATES

v.

LOUIS J. POMPONIO, JR., *Defendant.*

THE COURT: I think the Court of Appeals ought to settle it. I have regard, of course, for the position of my

associate, Judge Lewis, on the same matter. My disagreement with him is just that, and no more. However, the case is now before me for decision on this motion for arrest of judgment. I think the motion is well taken.

I am relieved to find that the Government, in accordance with the *Esposito* case, can appeal. I think the Defendant will be hard put to plead double jeopardy if the Government is successful in its appeal, having cited that case to me in support of its argument that the verdict may be reinstated if it is not reversed on other grounds.

I will, therefore, in accordance with Rule 34, arrest the judgment on the specific ground—and lest there be any mistake about it, I want to make sure that the specific ground of the arrest of judgment is that the indictment, Counts, I, V and IX do not charge an offense, and the reason I am of the view that they do not charge an offense is because the unlawful activity referred to in the indictment as being promoted or furthered by the Defendant, Louis J. Pomponio, Jr., namely, Section 215 of Title 18 of the U. S. Code and the New York Penal Code, in my view do not come within the unlawful activity definition of Section 1952 of Title 18.

I do not believe that there would be a requirement, before the Government would appeal, that sentence be imposed in the case and, therefore, I will postpone sentencing, retaining jurisdiction of the case, however, for sentencing should on appeal the case be reversed.

I hereby certify that the foregoing is a true transcript of the oral statement of the Court from the Bench.

/s/ Frances Webb
Reporter

Indictment

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 269-73

UNITED STATES OF AMERICA

v.

LOUIS POMPONIO, JR.

JULY *1972* SPECIAL TERM GRAND JURY—At Alexandria

THE GRAND JURY CHARGES:

A. 1. That the defendants, LOUIS J. POMPONIO, JR., PAUL POMPONIO and PETER POMPONIO, hereinafter referred to either individually or as "the POMPONIOS," at all times mentioned in this indictment, maintained residences and offices in the State of Virginia and were endeavoring through a network of family controlled corporations to build, own and operate high-rise buildings in Northern Virginia and the District of Columbia.

2. That the defendant, CHARLES J. PILUSO, Esquire, at all times material herein, maintained a residence and an office in the State of Virginia and was associated in the endeavors of the brothers referred to in paragraph A. 1. above.

3. That Sidney M. Zneimer, at all times material herein, resided in the State of New York and was a vice president of the Royal National Bank and worked at the offices of said bank located in New York City in the State of New York with general responsibility for reviewing and evaluating requests for construction loans, arranging for participation by other lending organizations when an approved loan request was contingent on such arrangements being

made, and general administration of the loan, including authorization of progress advances.

4. That at all times material herein, the Royal National Bank was a national banking institution located and conducting business in the State of New York.

5. That at all times material herein:

a. Martin Van Buren Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the Martin Van Buren Building located thereon during and subsequent to construction of said building.

b. James Polk Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the James Polk Building located thereon during and subsequent to construction of said building.

c. Abington Realty Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the Pomponio Plaza East Building located thereon during and subsequent to construction of said building.

d. National Center Corporation was owned and controlled by the POMPONIOS for the principal purpose of obtaining and owning land and developing on it what later became known as the National Center in Arlington, Virginia.

e. Federal Realty and Development Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the Commonwealth Building located thereon during and subsequent to construction of said building.

f. James Buchanan Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the James Buchanan Apartments located

thereon during and subsequent to construction of said apartments.

g. Zachary Taylor Corporation was controlled by the POMPONIOS for the principal purpose of owning land and the Zachary Taylor Building located thereon during and subsequent to construction of said building.

• • •

i. Virginia Corporation was controlled by the POMPONIOS for the principal purpose of owning land and the Patrick Henry Building located thereon during and subsequent to construction of said building.

6. That at all times material herein, it was a violation of the criminal laws of the State of New York for any person to confer any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

7. That at all times material herein, Real Equity Consultants was a corporation controlled, owned and operated by Sidney M. Zneimer for the benefit of Sidney M. Zneimer.

B. That commencing on or about September 1, 1967, and continuously thereafter up to and including the date of this indictment, the exact dates to the grand jurors being unknown, in the Eastern District of Virginia and elsewhere, the defendants, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other and with Sidney M. Zneimer, an unindicted co-conspirator, and with divers other persons to the grand jury unknown, to commit certain offenses against the United States, in violation of the provisions of Section 1952 of Title 18, United States Code in that the defendants would travel and willfully cause others to travel in interstate comerce and that they would use and will-

fully cause others to use facilities in interstate commerce, including interstate banking facilities, * * *, air terminals, commercial limosine service, credit cards, and commercial air travel, all of the above with the intent to promote, manage, establish, and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crimes of commercial bribery, in violation of the laws of the State of New York and the paying of commissions to an officer of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, for procuring loans from said bank, in violation of Title 18, United States Code, Section 215, and it was further a part of the conspiracy that the defendants would thereafter perform and cause others to perform acts promoting, managing, establishing, and carrying on of said unlawful activities and acts facilitating the promoting, managing, establishing, and carrying on of said unlawful activity.

* * * *

COUNT V

B. From on or about March 12, 1970 through November 19, 1971, in the Eastern District of Virginia and elsewhere, LOUIS J. POMPONIO, JR., * * * did willfully travel from the State of Virginia to the State of New York, with the intent to promote, manage, carry on, and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180) and of the United States (Title 18, United States Code, Section 215); the said unlawful activity relating to the efforts of LOUIS J. POMPONIO, JR., CHARLES J. PILUSO and PAUL POMPONIO to influence Sidney M. Zneimer in the performance of his duties at the Royal National Bank by giving the said Sidney M. Zneimer checks, as detailed in the table below, and drawn on the Royal National Bank of New York, payable to Real Equity Con-

sultants, Inc., and that thereafter the defendants did perform and attempt to perform the acts of promoting, managing, establishing and carrying on and facilitating the promoting, managing and carrying on of said unlawful activity.

Date of Check	No. of Check	Account	Amount
3/12/70	294	James Buchanan Corp.	$25,000
3/13/70	101A & T-1	Zachary Taylor Corp.	25,000
5/27/70	248	Zachary Taylor Corp.	25,000
10/ 5/70	1010	Columbia Plaza Corp.	25,000
1/ 4/71	145	Virginia Corp.	25,000
1/11/71	1186	Columbia Plaza Corp.	25,000
10/ 6/71	122	Chester Arthur Corp.	25,000

(Violation of Title 18, United States Code, Sections 1952 and 2)

* * * *

COUNT IX

B. On or about December 13, 1971, in the Eastern District of Virginia, LOUIS J. POMPONIO, JR., * * * caused Lewis Payne to travel from the State of Virginia to the State of New York, with the intent to promote, manage, carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180) and of the United States (Title 18 United States Code, Section 215); the said unlawful activity relating to the efforts of LOUIS J. POMPONIO, JR., PAUL POMPONIO and CHARLES J. PILUSO to influence Sidney M. Zneimer in the performance of his duties at the Royal National Bank, and that thereafter the defendants did perform and attempt to perform the acts of promoting, managing, establishing and carrying on, and facilitating the promoting, managing and carrying on of said unlawful activity. (Violation of Title 18, United States Code, Sections 1952 and 2)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 269-73A

UNITED STATES OF AMERICA

v.

LOUIS J. POMPONIO, JR., ET AL.

Motion to Dismiss the Indictment for Failing to State Crimes

The Defendants Louis J. Pomponio, Jr., Peter Pomponio, Paul Pomponio and Charles J. Piluso, through their undersigned attorneys, hereby respectfully request this Honorable Court to dismiss the Indictment on the ground that, since the crimes of commercial bribery and receipt of commissions or gifts for procuring loans are not unlawful activities defined by 18 U.S.C. § 1952, Counts I through IX are deficient as a matter of law and fail to state crimes over which this Court has jurisdiction; all as is more particular set out in the Memorandum of Points and Authorities which is attached hereto and made a part hereof.

Respectfully submitted,

COLE AND GRONER

By /s/ ALAN Y. COLE
Alan Y. Cole
1730 K Street, N.W.
Washington, D.C. 20006

/s/ LEE A. SCHUTZMAN
Lee A. Schutzman
8346 Forrester Boulevard
Springfield, Virginia 22152

Attorneys for Defendants

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 269-73A

UNITED STATES OF AMERICA

v.

LOUIS J. POMPONIO, JR., ET AL.

Memorandum of Points and Authorities in Support of Motion to Dismiss the Indictment for Failing to State Crimes

All of the Defendants are charged in Count I with conspiracy (18 U.S.C. § 371) to violate the Travel Act (18 U.S.C. § 1952) by utilizing the facilities of interstate commerce to carry on the unlawful activity of commercial bribery in violation of the laws of New York (New York Penal Law Article 180) and the paying of commissions to an officer of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, for procuring loans from said bank, in violation of 18 U.S.C. § 215.

Counts II through IX charge various of the Defendants with substantive violations of § 1952 and with aiding and abetting (18 U.S.C. § 2) in such violations,[1] in each instance by utilizing the facilities of interstate commerce to carry on certain unlawful activities in violation of the designated laws of New York and the United States. While Counts II through IX refer to the unlawful activities as being "the crime of bribery", they each refer to the laws of New York and the United States which actually define the state crime as commercial bribery and the Federal crime as "receipt of commissions or gifts for procuring loans", respectively. It

[1] These Counts do not indicate who aided and abetted and who were the principals. Presumably, this information will be obtained through a bill of particulars, if the Indictment is not dismissed.

can only be assumed that the omission of the word "commercial" before the word "bribery" in the last eight Counts [2] and the improper designation of the Federal law throughout the Indictment [3] were oversights, and this Memorandum will accordingly treat those Counts as if these laws were properly designated as indicated above.

1. *The Charge In The Indictment*

The legal heart of these Counts is § 1952. This provision was enacted in 1961 in response to then Attorney General Robert Kennedy's request for weapons to combat organized crime. *Hearings on S.1653-1658, S.1665 Before the Senate Committee on the Judiciary,* 87th Cong., 1st Sess. 1-7 (1961) (hereinafter "Senate Hearings").

The portion of the provision relevant to this case is as follows:

> "§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises
>
> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> * * * *
>
> "(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

---

[2] Counts II through IX refer expressly to New York Penal Law Article 180 and this provision is enttiled "Commercial bribing". Moreover, Paragraph A of Count I is realleged and reiterated as to Counts II through IX and Paragraph A, subparagraph 6 refers only to the New York State crime of commercial bribery rather than to bribery. See Section 3, *infra.*

[3] Count I of the Indictment describes 18 U.S.C. § 215 as prohibiting "*the paying* of commissions to an officer of a bank" (Count I, Paragraph 13). In fact, 18 U.S.C. § 215 prohibits only the "*receipt* of commissions" by such officer. This distinction is dealt with in greater detail in Section 6, *infra.*

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means . . . *bribery* . . . in violation of the laws of the State in which committed or of the United States." (Emphasis added.) [4]

It should be noted that the unlawful activity denoted in the statute is "bribery", By contrast, the alleged unlawful activity charged in Counts I through IX of the Indictment relates to "*commercial* bribery" and the receipt of commissions for procuring loans by an officer of a bank.

2. *The Crime of Bribery*

At common law the crime of bribery is limited to giving something of value to influence the action of a "public official" or a person whose official conduct is in any way connected with the government. 12 Am.Jur.2d *Bribery* § 2 (1964); see also *Black's Law Dictionary* 239 (Rev. 4th ed. 1968). The giving of something of value to *private* persons to influence non-official action was not comprehended by the crime of bribery.

The Courts of both New York and the United States recognize this difference. So, in *People* v. *Lafaro*, 25 N.Y. 336, 342, 165 N.E. 518, 520 (1929), it was held:

"The gist of the crime of bribery is the wrong done to the people by *corruption in the public service* . . . . We have given to the statutory definition of bribery a construction broad enough to cover cases where a *public officer* has accepted a bribe to act corruptly in a manner to which he bears some relation."

See also *People* v. *Chapman*, 13 N.Y.2d 97, 101, 242 N.Y.S.2d 200, 202, 192 N.E.2d 160, 161 (1963), and 11 C.J.S. *Bribery*

[4] Emphasis is added throughout this Memorandum unless otherwise indicated.

§ 1a (1938) adopting this definition; 11 C.J.S. *Bribery* § 1b expressly draws a distinction between the "crime of bribery" and the "bribery of a private agent or employer to influence his action in relation to his principal's or employer's business."

The United States Supreme Court has adopted a like definition:

> "[The Section] with respect to the acceptance of bribes, provides that 'whoever, being *an officer* of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the government thereof,' accepts money, etc., 'with intent to have his decision or action on any question, matter, cause, or proceeding which may a any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby,' shall be punished as stated. . . . [The Section] as to bribe giving uses similar language in defining the *official relation* of the recipient, and the character of the action intended to be influenced." *United States* v. *Birdsall,* 233 U.S. 223, 229 (1914).

3. *The Commercial Bribery Law of New York*

The section of the New York Penal Law which these Defendants are charged with violating is section 180. It provides as follows:

> "§ 180.00 Commercial bribing
>
> "A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.
>
> "Commercial bribing is a class B *misdemeanor.*"

The crime of bribery is defined in an entirely different section of the New York Penal Law, Section 200, which provides as follows:

> "§ 200.00 Bribery
>
> "A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a *public* servant upon an agreement or understanding that such *public* servant's vote, opinion, judgment, action, decision or exercise of discretion as a *public* servant will thereby be influenced.
>
> "Bribery is a class D *felony.*"

The distinction between the two is readily apparent. The commercial bribery statute relates entirely to private parties rather than to public officials; it creates a misdemeanor while the bribery statute creates a felony.

4. *18 U.S.C. § 215*

The Federal law which the Defendants are charged with violating is 18 U.S.C. § 215, which is entitled "Receipt of commissions of gifts for procuring loans." It provides as follows:

> "Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both."

The crime of bribery is defined in an entirely different section of Title 18, Section 201, which provides in relevant part as follows:

"§ 201 Bribery of public officials and witnesses

"(a) For the purpose of this section:

'*public official*' means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

'person who has been selected to be a *public official*' means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

'*official act*' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his *official capacity*, or in his place of trust or profit.

"(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any *public official* or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any *official act; or*

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any *fraud*, or make opportunity for the commission of any fraud, *on the United States;* or

(3) to induce such public official or such person who has been selected to be a public official to do or

omit to do any act *in violation of his lawful duty,* or

. . . . .

"(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any *public official,* former public official, or person selected to be a public official, for or because of any *official act* performed or to be performed by such public official, former public official, or person selected to be a public official;

. . . .

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

The distinction between these statutes is readily apparent. The bribery statute, 18 U.S.C. § 201, relates solely to *public officials* rather than private employees, such as bank employees; it relates solely to *official acts and duties* rather than non-public activities, like bank loans; and it creates a felony while § 215 creates only a misdemeanor. The distinctions between § 215 and § 201 are parallel to those between the commercial bribing and bribery statutes in state law except that § 215 does not even mention the word "bribery", although its state counterpart does.

5. *Section 1952 Applies To Bribery Only; Not To Commercial Bribery Or Receipt of Commissions Or Gifts For Procuring Loans*

Since § 1952 is a penal statute, it should be construed narrowly and strictly in accordance with its terms. "A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute . . . . "*Kordel* v. *United States,* 335 U.S. 345, 348-349 (1948). "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise * * *. Statutory words are uniformly presumed, unless the contrary appears, to be used in the ordinary and usual sense,

and with the meaning commonly attributed to them." *Caminetti* v. *United States,* 242 U.S. 470, 485-486 (1917).

Both the United States Supreme Court and the Fourth Circuit have interpreted § 1952 restrictively. *See Rewis* v. *United States,* 401 U.S. 743 (1971) and *United States* v. *Hawthorne,* 356 F.2d 740 (4th Cir. 1965), *cert. denied,* 384 U.S. 908 (1966).

Accordingly, since the unlawful activity referred to in Section 1952 is "bribery" and not "commercial bribery" or receipt of commissions by a bank officer, the Section should not be expanded to cover an activity to which it does not refer. Section 1952 does not reach every use of interstate facilities which may violate state or federal law; it reaches only those specifically and expressly enumerated therein. Commercial bribery—a crime plainly distinct from the crime of bribery—is not enumerated therein. Nor is receipt of commissions by a bank officer, the federal counterpart to the state commercial bribery statute. Violations of these sections do not therefore fall within the scope of § 1952.

6. *The Government Is Attempting To Create a New Law Under Which To Prosecute The Defendants*

Section 215 makes unlawful only receipt of commissions or gifts by officers or employees of banks insured by the Federal Deposit Insurance Corporation. This Section is codified in Chapter 11 of Title 18 along with twenty other sections. Of the twenty-one sections, twelve deal with the giving things of value to influence the actions of the recipients. It is significant that of these twelve statutes there are only two in which *only the receiving* of a commission or gift violates the law. 18 U.S.C. § 215, 217. Of the others, nine proscribe the giving as well as the receiving, 18 U.S.C. §§ 201, 203, 209-214 and 216, and one (U.S.C. § 224) makes the giving only unlawful. Thus, it is clear that Congress knew exactly how to criminalize giving, receiving, or both

giving and receiving; and in 18 U.S.C. § 215, it made only receiving criminal.[5]

Since the Congress has thus expressly, obviously and deliberately limited the scope of 18 U.S.C. § 215 to the receipt by a bank employee of commissions relating to loans made by such bank, this Court should not permit the United States Attorney—by relying upon either § 1952 or § 2—to create an entirely different crime. There is no converse, statutory or otherwise, to § 215. It creates a crime only of receiving; it does not create a crime of giving.

This situation may be analogized to statutes making extortion illegal. It has never been suggested that the victim of the extortionist is guilty of criminal conduct because he has capitulated to the extortionist's demands. And it would be inconceivable to suggest that by combining § 1952 and/or § 2 with the extortion statutes of either the Federal Government, 18 U.S.C. §§ 872, 891-894, or of the States, e.g., Pa. Stat. Ann. tit. 18, § 4318, persons who utilized the facilities of interstate commerce and made payments to extortionists have thereby committed crimes against the United States.

The situation in this case is no different. Congress, in its wisdom proscribed *only the receiving* of such payments; it did not proscribe the giving of them. It recognized that when a borrower pays a commission to a bank employee in conjunction with a bank loan, he does so under compulsion and not as a volunteer. In this respect, the giver of the commission to a bank employee is in precisely the same position as the payer of extortion; he is not the target of the proscriptive legislation, he is the intended beneficiary.

---

[5] § 215 should be compared in this regard particularly with 18 U.S.C. § 214 which makes unlawful *both* the giving and the receiving of any commissions for loans from any Federal Reserve bank. Compare § 210, which proscribes *giving* for the purpose of obtaining a Federal position with § 211, which proscribes receiving for that purpose. See also § 212 and § 213.

This Court should not countenance the blatant effort of this Indictment to expand the scope of § 215 into an area never heretofore reached and plainly beyond the meaning intended by Congress.

7. *The Legislative History of Section 1952 Confirms That It Is Applicable To Bribery Only*

The testimony of the late Robert F. Kennedy, former Attorney General of the United States, reveals that "[t]he target [of 18 U.S.C. § 1952] is clearly organized crime." Senate Hearings at 16. In referring to the offenses enumerated in 18 U.S.C. § 1952 including "bribery", the Attorney General stated "we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct. . . . *American citizens who are not connected with organized gambling and organized crime have nothing to fear . . . The only toes tread on here are those of racketeers and hoodlums. Id.* at 1617. In his statement before the House Judiciary Committee, the Attorney General stated that the bill was aimed at "the huge profits in liquor, narcotics, prostitution, as well as the use of these funds for corrupting *public officials* . . . ." *Id.* at 2. This limited aim of 18 U.S.C. § 1952 has been confirmed by both the Supreme Court of the United States in *Rewis* v. *United States, supra,* and by the United States Court of Appeals for the Fourth Circuit in *United States* v. *Hawthorne, supra.* The primary target of the Travel Act was gambling. The other areas to which it was directed were those related to or arising from gambling. "From the huge gambling profits flow the funds to bankroll the other illegal activities I have mentioned including *the bribery of local officials.*" Senate Hearings at 2.

Conclusion

On the basis of the foregoing, it is clear beyond cavil that the word "bribery" used in § 1952 was intended to and must be construed to mean bribery in the classic sense and

not "commercial bribery" or "receipt of commissions". Such a construction is supported by the plain language of § 1952: it uses the word "bribery" and not the words "commercial bribery" or "receipt of commissions". Such a construction is supported by the legislative history of § 1952 in which there are references to the corruption of "public" and "local" officials and where the intention of the sponsors of the legislation is made abundantly clear. Finally, such a construction is consistent with the canons of construction applicable to the interpretation of criminal statutes which require that such statutes be construed narrowly and strictly and are not to be enlarged beyond the clear meaning of their terms.

There is nothing on the face of § 1952 or in its legislative history to suggest that it was intended to apply to "commercial bribery" or "receipt of commissions" as well as to "bribery".[6]

For all of the foregoing reasons Counts I through IX of the Indictment fail as a matter of law to state crimes over which the Court has jurisdiction and, accordingly, the Indictment should be dismissed.

Respectfully submitted,

COLE AND GRONER

By /s/ ALAN Y. COLE
Alan Y. Cole
1730 K Street, N.W.
Washington, D.C. 20006

/s/ LEE A. SCHUTZMAN
Lee A. Schutzman
8346 Forrester Boulevard
Springfield, Virginia 22152

Attorneys for Defendants

---

[6] There is likewise nothing on the face or in the legislative history of § 215 to suggest that the activities of a payor were intended to be made unlawful.

Excerpts from Instructions to the Jury

(Tr. 1207-1208) *Charge of Court.*

Mr. Zneimer is named as a co-conspirator with them and diverse other persons and you need not worry about them, that is general language, to commit certain offenses against the United States, all in violation of § 1952, Title 18, of the Code.

And they spell it out in here and also in violation of Title 18, U.S.C. § 215 of the Code.

Now, you will notice that the conspiracy is to violate these two federal laws 1952 and 215.

(Tr. 1257-1258)

Mr. Cole: * * * I think that in talking about conspiracy at the outset of your charge, you misdefined the conspiracy. You indicated that it was a conspiracy to violate Title 18, U.S.C. § 1952 and also Title 18, U.S.C. § 215.

I don't think that's what the conspiracy here is. I think the conspiracy is only a violation of § 1952.

The Court: You haven't read the indictment.* * *

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

No. 269-73-A

UNITED STATES OF AMERICA

v.

CHARLES J. PILUSO

Judgment and Commitment

On this 26th day of April, 1974 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty on counts one (1), five (5) and nine (9) has been convicted of the offense of Conspiracy —T.18 U.S.C. 371—ct. 1 Interstate transportation in aid of racketeering—T.18 U.S.C. 1952 & 2—counts 5 & 9

as charged in the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years as to each of counts one (1), five (5) and nine (9). Sentence imposed herein shall run concurrently with each other and shall run consecutively with sentences imposed in Cr. Nos. 303 and 304-73-A—U.S. vs. Charles J. Piluso.

IT IS ADJUDGED that on motion of the U.S. Attorney counts two (2), four (4) six (6) and eight (8) are dismissed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

illegible
United States District Judge.

W. FARLEY POWERS, JR.,
Clerk.

SUPREME COURT OF THE UNITED STATES

No. A-745

CHARLES J. PILUSO, *Petitioner*

v.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 3, 1975

/s/ WARREN E. BURGER
Chief Justice of the United States

Dated this 20 day of March, 1975

INDEX

	Page
Opinion below	1
Jurisdiction	2
Statutes involved	2
Questions presented	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:	
Cupp v. *Naughten*, 414 U.S. 141	10
Erlenbaugh v. *United States*, 409 U.S. 239	7
Leary v. *United States*, 395 U.S. 6	10
Razete v. *United States*, 199 F. 2d 44, certiorari denied, 344 U.S. 904	9
Rewis v. *United States*, 401 U.S. 808	7
Stromberg v. *California*, 283 U.S. 359	10
United States v. *Brennan*, 394 F. 2d 151	7
United States v. *Gary*, 447 F. 2d 907	10
United States v. *Karigiannis*, 430 F. 2d 148, certiorari denied, 400 U.S. 904	7
United States v. *Nardello*, 393 U.S. 286	8, 9
United States v. *Niedelman*, 356 F. Supp. 979	5
Wisniewski v. *United States*, 353 U.S. 901	5
Statutes and rules:	
18 U.S.C. 2	9
18 U.S.C. 201	9
18 U.S.C. 215	*passim*
18 U.S.C. 371	3
18 U.S.C. 1952	2, 3
18 U.S.C. 1952(a)(3)	6

588-205—75——1

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1975. The court of appeals denied rehearing on March 4, 1975. Petitioner Pomponio filed his petition for a writ of certiorari on April 3, 1975. On March 20, 1975, the Chief Justice extended petitioner Piluso's time for filing a petition for a writ of certiorari until May 3, 1975, and the petition was filed on May 2, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of 18 U.S.C. 215 and New York Penal Law § 180 (1975) are set forth at Pomponio Pet. 3–5.

QUESTIONS PRESENTED

1. Whether petitioners' indictment under 18 U.S.C. 1952 (the Travel Act) was invalidly based on violations of Section 180 of the New York Penal Law (concerning commercial bribery) and 18 U.S.C. 215 (concerning payments to bank officials for aid in securing loans).

2. Whether, as to petitioner Piluso, the trial court erroneously instructed the jury that it could rely on conduct violating either statute in finding "bribery" within the meaning of the Travel Act.

3. Whether petitioner Piluso was prejudiced by the trial court's inaccurate description of the conspiracy charged during an otherwise proper instruction.

STATEMENT

Petitioners were indicted in the Eastern District of Virginia for conspiracy and substantive offenses involving interstate travel to promote the unlawful activity of bribery, in violation of 18 U.S.C. 1952, and 371 (Pomponio Pet. App. 10a–15a; Piluso Pet. App. 10a–14a).[1] Prior to trial petitioners moved to dismiss the indictment, claiming that the unlawful bribery activities they were accused of traveling to promote—violations of 18 U.S.C. 215 and Section 180 of the New York Penal Law—did not constitute the "unlawful activity" of "bribery" under the Travel Act, 18 U.S.C. 1952 (Piluso Pet. App. 15a). The district court denied the motion.

After the court severed the case against petitioner Pomponio because of his health problems, the trial of petitioner Piluso and his co-defendants proceeded and a jury convicted petitioner Piluso on one count of conspiracy to violate, and two counts of violation, of the Travel Act. He was sentenced to concurrent terms of two years' imprisonment.

Petitioner Pomponio was convicted by a jury on the same charges. He moved for arrest of judgment pursuant to Rule 34, Fed. R. Crim. P., reiterating his challenge to the indictment on the ground that the Travel Act did not cover the unlawful activity charged. The district court granted the motion (Pom-

[1] Also indicted were Peter and Paul Pomponio, whom the jury acquitted.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1975. The court of appeals denied rehearing on March 4, 1975. Petitioner Pomponio filed his petition for a writ of certiorari on April 3, 1975. On March 20, 1975, the Chief Justice extended petitioner Piluso's time for filing a petition for a writ of certiorari until May 3, 1975, and the petition was filed on May 2, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of 18 U.S.C. 215 and New York Penal Law § 180 (1975) are set forth at Pomponio Pet. 3–5.

QUESTIONS PRESENTED

1. Whether petitioners' indictment under 18 U.S.C. 1952 (the Travel Act) was invalidly based on violations of Section 180 of the New York Penal Law (concerning commercial bribery) and 18 U.S.C. 215 (concerning payments to bank officials for aid in securing loans).

2. Whether, as to petitioner Piluso, the trial court erroneously instructed the jury that it could rely on conduct violating either statute in finding "bribery" within the meaning of the Travel Act.

3. Whether petitioner Piluso was prejudiced by the trial court's inaccurate description of the conspiracy charged during an otherwise proper instruction.

STATEMENT

Petitioners were indicted in the Eastern District of Virginia for conspiracy and substantive offenses involving interstate travel to promote the unlawful activity of bribery, in violation of 18 U.S.C. 1952, and 371 (Pomponio Pet. App. 10a–15a; Piluso Pet. App. 10a–14a).[1] Prior to trial petitioners moved to dismiss the indictment, claiming that the unlawful bribery activities they were accused of traveling to promote—violations of 18 U.S.C. 215 and Section 180 of the New York Penal Law—did not constitute the "unlawful activity" of "bribery" under the Travel Act, 18 U.S.C. 1952 (Piluso Pet. App. 15a). The district court denied the motion.

After the court severed the case against petitioner Pomponio because of his health problems, the trial of petitioner Piluso and his co-defendants proceeded and a jury convicted petitioner Piluso on one count of conspiracy to violate, and two counts of violation, of the Travel Act. He was sentenced to concurrent terms of two years' imprisonment.

Petitioner Pomponio was convicted by a jury on the same charges. He moved for arrest of judgment pursuant to Rule 34, Fed. R. Crim. P., reiterating his challenge to the indictment on the ground that the Travel Act did not cover the unlawful activity charged. The district court granted the motion (Pom-

[1] Also indicted were Peter and Paul Pomponio, whom the jury acquitted.

ponio Pet. App. 9a–10a), and the government appealed.

The court of appeals, having consolidated the appeals, reversed and remanded in petitioner Pomponio's case and affirmed petitioner Piluso's conviction, holding that violations of Section 180 of the New York Penal Law and 18 U.S.C. 215 constitute the unlawful activity of bribery under the Travel Act (Pet. Apps. 1a–7a).

The evidence is not in dispute and may be briefly summarized. As part of his job as senior vice-president of the Royal National Bank in New York City, in charge of real estate construction and financing loans, Sidney Zneimer processed requests for periodic advances or draws against construction loans. Bank inspectors would verify that the progress in construction work was as represented in the individual's draw request so that the bank's loan would be secured by work in place. (Tr. 280–287.)

Petitioners were in the business of constructing high-rise buildings. In 1967, on their own initiative, they paid Zneimer for securing for them a loan to pay off a second mortgage owed to the Royal National Bank. Thereafter, one of the petitioners travelled to New York City and gave Zneimer a check each time he approved a construction loan for one of their corporations.

Over a five-year period, Zneimer helped petitioners receive eleven construction loans from Royal National Bank, totalling $16 million. This included over-advances of approximately $3 million, most of which were given without the approval of the bank's inspec-

tors. Petitioners paid Zneimer $320,000. (Tr. 282–283, 293, 373–374, 494–496.)

ARGUMENT

1. Petitioners contend that the indictment did not charge a violation of the Travel Act, because acts in violation of the state law (N.Y. Penal L. § 180 (1975)) and the federal law (18 U.S.C. 215) referred to in the indictment did not constitute the "unlawful activity" of bribery within the meaning of the Act.[2] The decision of the court of appeals rejecting these claims does not conflict with the decision of other courts of appeals[3] and properly construes the Travel Act.

The indictment charged in essence that petitioners conspired to and did travel between Virginia and New York with the intent to make payments to the officer of a national banking association to influence him in the performance of his duties without the consent of the bank, and that they thereafter made such payments, thereby engaging in the unlawful activity of bribery in violation of N.Y. Penal L. § 180

[2] Petitioner Piluso makes the same challenge to his conviction, but since he does not dispute the sufficiency of the evidence to support the allegations of the indictment, we address the issues in the context of the indictment.

[3] Petitioners assert (Pomponio Pet. 9–10; Piluso Pet. 16–22) a conflict with *United States* v. *Niedelman*, 356 F. Supp. 979, 980–982 (S.D. N.Y.), holding in conflict with other decisions in the same district, that a Travel Act charge cannot be based on N.Y. Penal L. § 180. But a conflict between decisions of a court of appeals and of a district court does not require resolution by this Court. The conflict among judges in the Southern District of New York is for the Second Circuit to resolve. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

and 18 U.S.C. 215. The New York law proscribes the misdemeanor of "commercial bribing," consisting of the conferring of a benefit on an employee to influence his conduct in relation to his employer's affairs, without the latter's consent. N.Y. Penal L. § 180. The federal law makes it a misdemeanor for an officer of any bank whose deposits are insured by the Federal Deposit Insurance Corporation to receive or agree to receive anything of value from any person for endeavoring to procure a loan from the bank. 18 U.S.C. 215.

a. Petitioners argue (Pomponio Pet. 16, 20; Piluso Pet. 14–19) that violations of neither the state law nor the federal law can be a basis for violation of the Travel Act, which is a felony, because they are both misdemeanors. The Travel Act makes it a crime to travel interstate to promote "any unlawful activity" (18 U.S.C. 1952(a)(3)), which is defined as including, *inter alia*, "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States." 18 U.S.C. 1952(b)(2).[4]

There is nothing in this language that limits it to unlawful activity that is a felony. On the contrary, it broadly prohibits certain offenses that are "in violation of the laws of" a state or the United States. Conduct that a state or the United States has made a misdemeanor is conduct "in violation of" its laws.

The courts of appeals have rejected petitioners'

[4] Under Section 1952(b)(1), "unlawful activity" also includes any business enterprise involving gambling, non-tax-paid liquor, narcotics or controlled substances, or prostitution offenses in violation of state or federal law, without regard to their status as felonies or misdemeanors.

narrower reading of the Travel Act and applied the statute to travel to promote crimes that are misdemeanors. See, *e.g., United States* v. *Brennan,* 394 F. 2d 151, 153 (C.A. 2); *United States* v. *Karigiannis,* 430 F. 2d 148, 150 (C.A. 7), certiorari denied, 400 U.S. 904. Indeed, the state law violations underlying the Travel Act violation this Court upheld in *Erlenbaugh* v. *United States,* 409 U.S. 239, included misdemeanors.[5]

The characterization of bribery and other "unlawful activities" referred to in the Travel Act may vary among the states at any given time,[6] and may not always remain what it was when the Act was enacted in 1961. There is no indication that Congress incor-

[5] For example, under Ind. Ann. Stat. § 10-2307 (1956) (see 409 U.S. at 242), the maximum penalty was a $100 fine and three months' imprisonment.

This Court's pre-*Erlenbaugh* decision in *Rewis* v. *United States,* 401 U.S. 808, is not to the contrary. In stating that Congress did not intend that "the geographic origin of [a gambler's] customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies" (*id.* at 812), the Court was addressing the role of the interstate travel, not the classification of the state offense. (In fact, violation of the state statute underlying the indictment in *Rewis* (Fla. Stat. Ann. § 849.09 (1975)) was punishable by imprisonment for from one to five years in the circumstances alleged in that case.) Indeed, the statement apparently recognized that, if the travel requisites of the Act were met, it would reach travel to promote "relatively minor state offenses."

[6] For example, bribery of public officers was a misdemeanor at common law (Clark & Marshall, *Crimes* § 14.02, at 1032 (7th ed. 1967)) and is not a felony in all states (*e.g.*, R. I. Gen. L. Ann. § 11-7-3 (1956)), and "commercial bribery" is a felony in some states, *E.g.*, Tex. Codes Ann. § 32.43 (1974); Colo. Rev. Stat. § 40-5-401 (1963).

porated *sub silentio* such an adventitious limitation into the Travel Act.

b. Petitioners contend that violation of neither N.Y. Penal L. § 180 nor 18 U.S.C. 215 constitutes "bribery" within the meaning of the Travel Act. With respect to the state law, petitioners contend (Pomponio Pet. 11–15; Piluso Pet. 19–22) that the Travel Act is implicitly limited to bribery of public officers, as at common law, and does not encompass "commercial bribery" of purely private employees. But while the primary impetus for this provision of the Travel Act may have been bribery of public officials (cf. *United States* v. *Nardello*, 393 U.S. 286, 292, n. 9), the Act is not limited to bribery of public officials nor to bribery as defined at common law.

As petitioners acknowledge (Pomponio Pet. 12, n. 7: Piluso Pet. 20), when the Travel Act was enacted the bribery statutes in many states were not confined to public officials and often covered commercial bribery. In view of Congress' purpose in the Travel Act of curtailing multi-state criminal enterprises, the legislature did not intend to ignore the broadened scope that the state bribery statutes had come to have. The essence of the offense of bribery is the unauthorized exchange of money for action the recipient is empowered to take (Clark & Marshall, *Crimes* § 14.02 (7th ed. 1967); 3 *Wharton's Criminal Law and Procedure* § 1386 (Anderson ed. 1957); the public or private character of the action is secondary.

c. Petitioners make a similarly technical challenge to the indictment's reference to 18 U.S.C. 215, claim-

ing that it proscribes "graft," not "bribery," and penalizes only the recipient, not the briber (Pomponio Pet. 17–19; Piluso Pet. 10–14). This Court made clear in *Nardello,* however, in holding that acts prohibited by a "blackmail" statute constituted "extortion" for the purpose of the Travel Act (393 U.S. at 293–295), that the applicability of the Act is governed by the essential nature of the underlying offense, not its particular title or characterization.

Like other bribery statutes, Section 215 is directed at, and seeks to prohibit, the unauthorized exchange of action for money. That it directly penalizes only the recipient instead of both parties (cf. 18 U.S.C. 201) makes it no less a "bribery" statute, particularly in view of the potential liability of the giver of the bribe as an aider and abetter. 18 U.S.C. 2.[7]

2. Petitioner Piluso contends (Pet. 23–25)[8] that if this Court were to hold that only either the New York law or Section 215 can be relied upon to establish the unlawful activity of bribery under the Travel Act, but

[7] Petitioners' reliance (Pomponio Pet. 17; Piluso Pet. 12) on *Razete* v. *United States*, 199 F. 2d 44 (C.A. 6), certiorari denied, 344 U.S. 904, is misplaced. There, in holding specific criminal intent unnecessary under 22 U.S.C. 1584 (prohibiting the giving of something to, or its acceptance by, a government employee in connection with procurement of goods or services), the court discussed in *dicta* certain general distinctions between "graft" and "bribery," but noted that the latter included "receiving * * * anything of value with the intent to influence the recipient's actions * * *." *Id.* at 48.

[8] Petitioner Pomponio, who has not yet been sentenced nor appealed his conviction, cannot and does not make this claim at this juncture.

not both, his conviction cannot stand because the jury may have based it upon travel to promote bribery in violation of the inapplicable statute. Cf. *Stromberg* v. *California*, 283 U.S. 359, 368; *Leary* v. *United States*, 395 U.S. 6, 31–32.

If the Court were to agree with our submission that the Travel Act covers the crimes prohibited in both statutes, there would be no occasion to consider this issue. In any event, Piluso did not object to the charge on this ground, did not attempt to require the government to elect one of the statutory references, and did not seek appropriate forms of special questions to the jury. Unlike *Stromberg* and *Leary*, the same evidence here showed schemes to promote violations of both statutes.[9]

3. Petitioner Piluso also contends (Pet. 25–27) that a single inaccuracy in the trial court's description of the scope of the conspiracy constituted reversible error.[10] However, in its instructions, covering 50 pages of trial transcript (Tr. 1201–1251), the district court accurately explained several times the nature and scope of the Travel Act charges and the conspiracy charge (Tr. 1206, 1207, 1228–1229, 1240). Viewing the charge as a whole (*Cupp* v. *Naughten*, 414 U.S.

[9] In both *Stromberg* and *Leary* there was a strong possibility that the jury convicted on the basis of facts that did not establish an offense.

[10] At one point in the court's extensive charge, after having explained several times the scope of the substantive and conspiracy charges, the court erroneously stated "that the conspiracy is to violate these two federal laws, 1952 and 215" (Tr. 1208; Piluso Pet. App. 27a).

141, 146–147) and the unchallenged sufficiency of the evidence, the isolated, fleeting misstatement did not constitute reversible error. See *United States* v. *Gary*, 447 F. 2d 907–911 (C.A. 9).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
JEROME M. FEIT,
JAMES A. ROTHSCHILD,
Attorneys.

JULY 1975.

U. S. GOVERNMENT PRINTING OFFICE: 1975

Supreme Court, U. S.
FILED
OCT 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 74-1374

CHARLES J. PILUSO, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Bailey's Crossroads
Virginia 22041
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT 3

I. This Court Should Reconsider Its Denial of Certiorari Since the Ruling of the United States Court of Appeals for the Fourth Circuit Has Created An Expansive Extension of Federal Jurisdiction Which Transforms Countless Conflict of Interest Statutes and Commercial Bribery Statutes of All Types Throughout the Fifty States into Federal Felonies Under the Travel Act 3

II. Should This Court Decide Not To Resolve the Issue Presented in This Petition for Rehearing, Specifically the Massive Enlargement of Federal Jurisdiction in Point I Above, This Court Should Nonetheless Grant Rehearing and Summarily Reverse and Order a New Trial Unless This Court Concludes That Both Title 18, Section 215, USC, and Section 180 of the New York Penal Code Constitute Unlawful Activities within the Meaning of the Travel Act 10

CONCLUSION 12

CERTIFICATE OF GOOD FAITH 12

INDEX OF CITATIONS

CASES:

Erlenbaugh v. *United States*, 409 U.S. 239, 93 S.Ct. 477 (1972) 3

Leary v. *United States*, 393 U.S. 631, 89 S.Ct. 532 11

Rayette v. *United States*, 199 F.2d 48 (6 Cir.), *cert. denied* 344 U.S. 904 (1952) 4

Rewis v. *United States*, 401 U.S. 808, 91 S.Ct. 1056 (1971) 2, 39

Page

United States v. *Archer*, 486 F.2d 670 (1973) 7
United States v. *Niedelman*, 356 F. Supp. 979 (1973) .. 3

Arizona Revised Statutes, Title 45, Section 942 7
Massachusetts General Laws, Chapter 268, Section 10 6
New York Penal Code, Section 180 .....passim
Travel Act, Title 18, Section 1952 U.S. Code .....passim

Athletic Corruption Statutes of Several States 6
Commercial Bribery Statutes of Several States 5
Conflict of Interest Statutes of Several States 5

N. Abrams, Consultant's Report on Jurisdiction, 1 Working Papers of the National Commission on Reform of Federal Criminal Laws, 33, 36 (1970) 8

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 74-1374

CHARLES J. PILUSO, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING

Petitioner prays that this Court grant a rehearing in the above-entitled matter. This Court denied certiorari on October 6, 1975. Justice Douglas dissented and stated that certiorari should be granted.

QUESTION PRESENTED

DOES NOT THE DENIAL OF CERTIORARI BY THIS COURT, JUSTICE DOUGLAS DISSENTING, TO THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, LEAVE UNDISTURBED A RULING THAT EXPANDS THE FEDERAL JURISDICTION UNDER THE TRAVEL ACT TO INCLUDE ALL OF THE COMMERCIAL BRIBERY STATUTES IN THE SEVERAL STATES AND VIRTUALLY ALL OF THE CONFLICT OF INTEREST STATUTES ENACTED THROUGHOUT THE

SEVERAL STATES IN VIOLATION OF THIS COURT'S WARNING IN REWIS V. UNITED STATES, 401 U.S. 808, 91 S.Ct. 1056 (1971).

STATEMENT OF THE CASE

The Petitioner, an attorney at law, was tried in a three-count indictment alleging conspiracy and substantive violations of the Travel Act, Title 18, Section 1952 USC. The unlawful activities alleged in the indictment as the predicate for the invocation of the Travel Act were the conflict of interest statute, Title 18, Section 215 USC, and the commercial bribery statute of the State of New York, Section 180 of the New York Penal Code. Two United States District Court Judges in Alexandria, Virginia, came to different conclusions as to whether either or both of these statutes could be validly alleged as the unlawful activity to invoke the jurisdiction of the Travel Act. See *Piluso* v. *United States,* No. 74-1374, and *Louis Pomponio* v. *United States,* No. 74-1260. See Pomponio Appendix 9A. The United States Court of Appeals for the Fourth Circuit rendered an opinion on February 7, 1975, which reversed the dismissal of the indictment ordered by Judge Bryan in *Louis Pomponio* v. *United States,* 74-1260, in this Court and affirmed the contrary decision of the judge in the instant case who held that Section 215 of Title 18 and Section 180 of the New York Penal Code constituted unlawful activities which properly invoked the jurisdiction of the Federal Travel Act, Title 18, Section 1952 USC.

Petition for certiorari was denied by this Court on October 6, 1975, with Mr. Justice Douglas dissenting. stating that he would grant certiorari.

ARGUMENT

I. This Court Should Reconsider Its Denial of Certiorari Since the Ruling of the United States Court of Appeals for the Fourth Circuit Has Created an Expansive Extension of Federal Jurisdiction Which Transforms Countless Conflict of Interest Statutes and Commercial Bribery Statutes of All Types Throughout the Fifty States into Federal Felonies under the Travel Act.

The scope and impact of the opinion by the United States Court of Appeals for the Fourth Circuit should prompt this Court to reconsider its denial of certiorari and to join with Mr. Justice Douglas in granting certiorari, not because of the injustice done to the Petitioner in the instant case, *but because of the resultant invidious expansion of Federal jurisdiction that the opinion of the United States Court of Appeals for the Fourth Circuit has spawned.*

In *Rewis* v. *United States,* 401 U.S. 808, 91 S.Ct. 1056 (1971), this Court warned of the impact on the several States that would result from an overexpansive interpretation of the Travel Act. This Court stated:

> "In such a context, Congress would certainly recognize that *an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources and might well produce situations* in which the geographic origin of customers, a matter of happenstance, *would transform relatively minor state offenses into federal felonies.*" See also *Erlenbaugh* v. *United States,* 409 U.S. 239, 93 S.Ct. 477 (1972).

The Court of Appeals, by its reversal of the arrest of judgment rendered by Judge Bryan in *Louis Pomponio* v. *United States,* 74-1260, and its refusal to follow the decision of the Southern District of New York in *United States* v. *Niedelman,* 356 F.Supp. 979 (1973),

has transformed the Travel Act into a Federal "umbrella," which, unless reviewed by this Court, authorizes and creates a mischievous precedent that will allow the Government to bring indictments under the Travel Act for a large number of conflict of interest statutes and all commercial bribery statutes enacted throughout the several States. The decision has also created the incongruous result of changing countless misdemeanor statutes enacted against commercial bribery and conflict of interest abuses into Federal felonies. It has also transformed Federal misdemeanors, such as Title 18, Section 215, into a Federal felony, thereby disrupting sentencing limits enacted by Congress.

As was pointed out in the main Petition for Certiorari, Title 18, Section 215 USC, was, by its legislative history, a conflict of interest statute and not a bribery statute. It was a Federal misdemeanor that imposed a penalty on a bank officer who received a gratuity, commission, discount, etc., in connection with his employment at a federally-insured bank. The statute did not make the giver of the money, gratuity or other form of consideration guilty of any crime. Its thrust was directed toward a bank officer who received benefits "by reason of his peculiar position of * * * influence or trust exacts from another." *Rayette* v. *United States,* 199 F.2d 48 (6 Cir.), *cert. denied,* 344 U.S. 904 (1952).

There are numerous conflict of interest statutes throughout the fifty States which are similar to Title 18, Section 215 USC. A sampling of these statutes are cited in the footnote below, which proscribe a punishment to the receiver only when the receiver exacts a commission, gratuity or bonus in connection with a

work function. We have also cited in the footnote a sampling of the commercial bribery statutes and bribery statutes with respect to athletes, all of which are now a basis for the invocation of the Federal Travel Act by virtue of the decision in the instant case.[1]

---

[1] *Conflict of Interest Statutes*
Title 18, § 215, United States Code
Arizona Revised Statutes: Title 45 § 942
California Revised Statutes: 1090
Colorado Revised Statutes: 11-20—101; 11-20—110
Florida Revised Statutes: 944.38; 839.08; 839.09; 839.091; 839.10; 337.04; 337.12; 340.26
Illinois Revised Statutes: Title 102 § 4.1, 4.2
Maine Revised Laws: Title 17 § 3104
Massachusetts General Laws Chapt. 268 § 10

Commercial Bribery Statutes
New York Penal Code: § 180
Arizona Revised Statutes Ann.: § 4-243; § 13-291
California Penal Code § 641
Connecticut General Revised Statutes: § 53-266; § 20-231
Indiana Ann. Statutes: § 10-605
Kentucky Revised Statutes: § 244.600
Louisiana Revised Statutes: § 14:73
Maine Revised Statutes Ann. ch. 136, § 17
Massachusetts Ann. Laws ch. 271, § 39
Michigan Statutes Ann. § 28.320
Montana Revised Codes Ann. § 94-35-221
Nebraska Revised Statutes: § 28-710
Nevada Revised Statutes: § 614.140; § 707.120
New Jersey Revised Statutes: § 2A:9-1, 93-8, 93-9, 32:23-21
North Carolina General Statutes: § 14-353
Oregon Revised Statutes: § 165:515
Pennsylvania Statutes Ann. tit. 18 § 4667
Rhode Island General Laws Ann. § 11-7-3
South Carolina Code: § 16-570
Tennessee Code Ann. § 39-821
Texas Penal Code art. 667-24
Utah Code Ann. § 7648-12
Virginia Code Ann. § 18-336
Washington Revised Code: § 49.44.020; § 49.44.060; § 78.34.210
Wisconsin Statutes Ann. §§ 134.05-06

(Continued on next page)

Typical of the sampling of the conflict of interest laws throughout the several States, which have now, ipso factor, become Federal felonies when combined with the Travel Act, are the statutes of Massachusetts and Arizona. In Massachusetts General Laws, Chapter 268, Section 10 reads:

> A member of the general court or executive council or of a state department or commission who is personally interested directly or indirectly in a contract made by the general court or by either branch thereof or by such department or commission or by its authority in which the Commonwealth is an interested party or a person so interested, who alone or with others represents the Commonwealth making such contract or such member or person who receives a commission, discount, bonus, present or reward from a person or persons making or performing such contract * * * shall be punished * * *

Athletic Corruption Statutes

Arizona Revised States Ann. §§ 5-115, -205
Arkansas Statutes: § 41-903
California Penal Code: § 337b
Colorado Revised Statutes Ann. § 40-12-2
Connecticut General Statutes Revised: § 53-287
Delaware Code Ann. tit. 28 §§ 704, 709
Florida Statutes Ann. § 838.12
Hawaii Revised Laws § 265-7
Illinois Statutes Ann. ch. 38 § 83a (Smith-Hurd Supp. 1959)
Indiana Ann. Statutes: § 10-606
Iowa Code Ann. § 739.12
Kentucky Revised Statutes: § 436.505
Maryland Ann. Code art. 27, § 24
Massachusetts Ann. Laws ch. 271 § 39A
Michigan Statutes Ann. § 28.319
Minnesota Statutes Ann. § 613.251
Mississippi Code Ann. § 2034.5

The Arizona revised statute, Title 45, Section 942, Interest of Officer in Contracts Prohibited—Penalty, reads:

> A. A director or any officer named in this chapter shall not in any manner be interested directly or indirectly in any contract awarded or to be awarded by the board or in the profits to be derived therefrom.
>
> B. An officer who violates this section is guilty of a misdemeanor or punishable by a fine not exceeding $500.00, by imprisonment in the county jail not exceeding six months, or both * * *

The decision below is certainly in conflict with the thrust of the United States Court of Appeals for the Second Circuit, speaking through Judge Friendly, in *United States* v. *Archer,* 486 F.2d 670 (1973). In that opinion Judge Friendly emphasized the dangers this court has spoken about in connection with an over-expansive interpretation of Federal jurisdiction under the Travel Act. Judge Friendly, in retracing the legislative history of the Act, referred to the Bill introduced by the Attorney General in the following terms:

> Yet the Bill he submitted, if read literally, would cover a $10.00 payment to fix a traffic ticket if only the person desiring the fix walked across a state line to pay off the policeman.

In another portion of the opinion, Judge Friendly stated:

> Today there is widespread concern whether the federal criminal law has not outrun reasonable bounds; *"federal auxiliary criminal jurisdiction" has spread to the point where "[t]here is practically no offense within the purview of local law that does not become a Federal crime if some dis-*

> *tinctive Federal involvement happens to be present.''* See N. Abrams, Consultant's Report on jurisdiction, 1 Working Papers of the National Commission on Reform of Federal Criminal Laws, 33, 36 (1970).

In a later portion in the opinion the Court stated:

> While the precise holding of Rewis was that the proprietors of a Florida gambling establishment did not violate the Travel Act merely because some of their customers came from Georgia, *a course of action forseeable and even designed, the opinion indicates that the Act is not to be stretched to the limits of its language.*

The effect of the opinion of the United States Court of Appeals for the Fourth Circuit herein is to extend in blanket fashion the jurisdiction of the Federal Travel Act over all State statutes which have made commercial bribery a crime and all State statutes which have made certain conflict of interest situations criminal and whose language is similar in content to Title 18, Section 201 USC.

This Court, in particular the members who did not join with Mr. Justice Douglas, should reconsider whether the Petition in this case should be granted because it is not confined simply to the conflict in interpretation over whether Sec. 180 Penal Code of New York and Title 18, Sec. 215 USC could invoke the jurisdiction of the Travel Act that was manifest in the conflicting opinions of the Federal District Judges in Virginia and New York but *because the opinion of the United States Court of Appeals for the Fourth Circuit has so expanded that Federal jurisdiction to such a*

myriad of State statutes, substantially effecting federal state relations referred to in Rewis v. *United States, supra.*

We ask this Court to reconsider its denial of certiorari and to grant rehearing. We ask this not primarily because of any injustice that has befallen the Petitioner but because, in the larger sense, the confusion and conflict which exists among the District Courts in two jurisdictions with respect to whether commercial bribery may serve as a fulcrum for the invocation of the Travel Act, and because the opinion of the United States Court of Appeals for the Fourth Circuit has now extended Federal jurisdiction under the Travel Act for the first time to a myriad of conflict of interest statutes throughout the several States. This opinion has blanketed Federal jurisdiction to hundreds of statutes throughout the country in the various States, a result directly opposed to the teaching of this Court in *Rewis* v. *United States, supra.* The fear expressed by Judge Friendly that the Travel Act, if carried to its broadest interpretation, would apply to the citizen who crosses a State line to fix a traffic ticket, is realized by this opinion, and every official denominated in the various State statutes, albeit conflict of interest or commercial bribery, is included under the Federal Travel Act by the opinion of the Court below. This Court should grant rehearing to the Petitioner in light of the overriding issue of Federal expansion and interference with State criminal procedures that this opinion has subsumed and endorsed.

II. Should This Court Decide Not To Resolve the Issue Presented in This Petition for Rehearing, Specifically the Massive Enlargement of Federal Jurisdiction Discussed in Point I Above, This Court Should Nonetheless Grant Rehearing and Summarily Reverse and Order a New Trial Unless This Court Concludes That Both Title 18, Section 215, USC, and Section 180 of the New York Penal Code Constitute Unlawful Activities Within the Meaning of the Travel Act.

If this Court does not feel the time is ripe to review the basic point raised in the Petition for Certiorari and in the Petition for Rehearing, the Court should nonetheless grant rehearing and summarily reverse and order a new trial for the Petitioner unless the Court independently finds that both Section 180 of the New York Penal Code and Section 215 of Title 18, USC, constitute unlawful activity which independently would invoke the Federal jurisdiction of the Travel Act. If one of the acts is deficient a new trial for the Petitioner would be required because of the trial jury's instructions.

The trial judge instructed the jury in the conjunctive on both statutes and thus there is no way that an appellate court can determine on what basis the jury returned its verdict. The trial judge stated to the jury:

> As I have told you, because in these two counts you must find that the crime was committed, that is again the crime in the travel in interstate commerce in furtherance of the bribery, the prohibited unlawful activity, one or the other, either in violation of the state law that I have read you as defined there or in violation of the federal banking law. (Tr. 1220)

Thereafter the Court stated (Tr. 1229):

> It is intent to promote or facilitate all the other words I used in connection therewith, the prohibited unlawful activity as set forth in that statute.
>
> Those two unlawful activities set forth are the bribery of Mr. Zneimer as that word used in the two statutes, the banking statute that I read you and that state statute.

This Court stated in *Leary* v. *United States,* 393 U.S. 631, 89 S.Ct. 532:

> It has long been settled that when a case is submitted to a jury on alternative theories the unconstitutionality of any of the theories requires the conviction be set aside. See Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532. See also, Mills v. United States, 164 U.S. 644, 17 S.Ct. 210; Nicola v. United States, 72 F.2d 787 (3rd Cir. 1934); Yates v. United States, 354 U.S. 298, 312 (1957), and United States v. Johns, 444 F.2d 58.

The present case represents the first appellate holding that Title 18, USC Section 215 of the United States Code, a conflict of interest statute, constitutes unlawful activity within the meaning of the Travel Act. Such a holding results in an impermissible conflict with respect to the legislative intent of Congress which designated Title 18, Section 215 USC as a misdemeanor, with a maximum punishment of $5,000 and imprisonment of not more than one year. By the simple expedient of tying together the Travel Act with this Federal misdemeanor, the Petitioner in this case has been sentenced as a felon under Federal law. The trial judge also submitted Section 182 of the New York Penal Code charging commercial bribery as a basis for convicting Petitioner under the Travel Act.

The submission by the trial judge of both theories to the jury as a basis for sustaining a conviction against the Petitioner, coupled with what is conceded by the Government to be an erroneous instruction by the trial judge to the jury, on the very charge that Petitioner was being tried for, should form an independent basis for this Court to grant rehearing and to summarily order a new trial as to the Petitioner, Piluso. See Tr. 1208, Petitioner's Appendix 27A, Petitioner's Petition for Certiorari, page 25, Government Opposition to Petition for Certiorari, page 10.

CONCLUSION

In view of the foregoing we pray that this Court grant the Petition for Rehearing.

Respectfully submitted,

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Bailey's Crossroads
Virginia 22041
Counsel for Petitioner

CERTIFICATE OF GOOD FAITH

I, Albert J. Ahern, Jr., being a member of the Bar, do hereby certify that the above Petition for Rehearing is filed in good faith and raises an issue that counsel does not feel has been gleaned from the original petition, and not for the purposes of delay.

ALBERT J. AHERN, JR.